(2)

No. 90-844

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do the provisions of the Multi-Employer Pension Plan amendments action of 1980 (MPPAA), 29 U.S.C. § 1381, et seq. apply to an action brought for withdrawal liability, even if, in such action, there are collateral issues that would under most circumstances be resolved by the National Labor Relations Board.

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JURISDICTION

The Respondents do not dispute the jurisdiction of this court.

STATEMENT

A. PREFATORY REMARKS

This action did not arise out of a labor dispute. The Pension Fund did not assert any claim before the NLRB, and neither the Trustees nor the Pension Plan were party to any NLRB proceedings. Furthermore, the Co-Defendant, Howard Systems, Inc., was not a party to any of the proceedings before the NLRB. This action arose out of the Petitioner's withdrawal from the Pension Plan.

B. NATURE OF THE CASE AND SUMMARY OF RELEVANT FACTS

The Trustees[1] of the Colorado Pipe Industry Pension Fund (hereinafter referred to as "Trustees") brought this action against the Petitioners (herein referred to collectively as "Howard") to recover their share of the unfunded, vested liability benefits under the pension plan. The basis of such liability is the Multi-employer Pension Plan Amendment Act of 1980 (MPPAA), 29 U.S.C. § 1381, *et seq.*[2]

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[1] The Trustees were correctly identified on page ii of Petition for Writ of Certiorari.

[2] A cause of action of recover delinquent contributions for pension, health, and other benefits was voluntarily dismissed by the Plaintiffs after the court's decision of *Laborers Health and Welfare Trust of Northern California, et al. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 98 L.Ed.2d 936, 108 S.Ct. 830 (1988).

The Pre-trial Order set forth in the appendix hereto, A16-39, contained a number of stipulations, which are set forth in Section IV thereof (A22-25). [Reference herein to this stipulation will be by the lettered paragraphs in Section IV of that Order.]

The Pension Fund is a multi-employer plan within the meaning of Section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a). (See Paragraph A). Howard Electrical and Mechanical, Inc., a wholly-owned subsidiary of Howard Systems, Inc. (Paragraph D), had collective bargaining agreements with two of the unions covered by the plan, Local Union No. 3 and Local Union No. 208, and under these agreements, contributed into the plan for its covered employees (Paragraph E). The last contract between Howard and the unions expired on May 31, 1983; however, after termination they continued to negotiate, but reached an impasse on December 31, 1983 (Paragraph F). Thereafter, Howard unilaterally implemented an impasse offer under which it paid pension contributions for journeyman plumbers and pipefitters then in its employ. Those journeymen were terminated by Howard on December 31, 1984 (Paragraph G), and Howard as of that date ceased all contributions to the plan. Howard continued, however, to do work within the jurisdiction covered by the plan, but made no further payments, though it did tender contributions in 1987 which were rejected by the Plaintiff Trustees (Paragraphs G & H).

On May 29, 1986, the Plaintiffs notified Howard, pursuant to § 4219(b)(1) of ERISA (29 U.S.C. § 1399(b)(1)) that the Trustees had determined that Howard had withdrawn from the plan on December 31, 1984 (the date they ceased making contributions) and demanded withdrawal

liability in the sum of $555,852, payable in installments (Paragraph J). That demand letter to Howard is set forth in the Appendix (A40-43). Howard requested a review of that termination of liability, pursuant to § 4219(b)(2) of ERISA (29 U.S.C. § 1399(b)(2)) in a letter dated July 17, 1986. Said letter is set forth in the Appendix (A44-48). The Trustees responded to Howard's request for review of their determination of liability, and advised them of their right to arbitrate should they so desire to do so. That letter is set forth in the Appendix (A49-52). Howard did not request arbitration of the Plaintiff's assessment of withdrawal liability, as provided under § 4221 of ERISA, (29 U.S.C. § 1401) (Paragraph L).

After Howard failed to arbitrate the dispute as required and failed to pay, the Plaintiffs brought this action pursuant to § 4221(b)(1) of ERISA (29 U.S.C. § 1401(b)(1)).

The Amended Complaint setting forth the claim is set forth in the Appendix (A1-8). Howard in its answer (Appendix A9-14) denied it withdrew on account of a settlement agreement it made with the NLRB; that it had suspended payments during a labor dispute under 29 U.S.C. § 1398, and that the claim for withdrawal liability was barred by a decision of an Administrative Law Judge in a case pending before the NLRB (which decision was subsequently reversed by the Board).

C. SUMMARY OF PROCEEDINGS BELOW

On cross-motions for summary judgment the District Court dismissed the Plaintiffs' Complaint. On appeal to the Tenth Circuit, the Circuit Court reversed the lower

court, and directed judgment be entered in favor of the Trustees on its Complaint.

SUMMARY OF ARGUMENT

A. THE DECISION OF THE CIRCUIT COURT BELOW IS CONSISTENT WITH THIS COURT'S OPINION IN *LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL. V. ADVANCED LIGHTWEIGHT CONCRETE CO., INC., SUPRA*, THE STATUTORY SCHEME FOR THE DETERMINATION AND ENFORCEMENT OF WITHDRAWAL LIABILITY AND ALL OF THE CIRCUITS WHICH HAVE RESOLVED THE ISSUE THAT THE COURT BELOW HAD BEFORE IT.

ARGUMENT

A. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN *LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL. V. ADVANCED LIGHTWEIGHT CONCRETE CO., INC.*

The issue before this court in *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) was whether or not Congress conferred upon the federal courts jurisdiction in actions brought to collect fringe benefit contributions that may be due after the contract has expired. After a careful review

of §§ 502(g)(2) and 515 of ERISA (29 U.S.C. § 1132(g)(2) and 29 U.S.C. § 1145) this court determined that no such jurisdiction was granted.

This court, however, recognized the difference between a liability for post-contract contributions and withdrawal liability under § 4301 of ERISA, 29 U.S.C. § 1381. Furthermore, this court in its Footnote 19 acknowledged that Congress expressly provided jurisdiction in federal court actions for withdrawal liability, even if the court had to resolve whether or not an impasse had occurred. The court noted:

> "It is true, as petitioners point out, that the district courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal."
>
> *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc. supra at pg. 552.*

The Tenth Circuit below recognized that this particular action was not a suit to collect contributions, and therefore this action did not fall within the jurisdictional limitations set forth in *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.* case. It noted further that this court determined that *Advanced Lightweight Concrete* involved a "narrow category of suits", the liability for which arose under the NLRA, whereas the Trustees' claim was created by Congress in 29 U.S.C. § 1381 which "explicitly vested federal courts with jurisdiction" (Petition Appendix A13).

B. THE DECISION BELOW WAS CONSISTENT WITH THE STATUTORY SCHEME.

Section 502(g)(2) and Section 515 of ERISA, which were the subject of the *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.* case, were part of ERISA as adopted in 1974. The MPPAA Amendments enacted by Congress in 1980 adopted a different statutory scheme for the determination and enforcement of withdrawal liability. These are set forth in §§ 4201 through 4281 of ERISA (29 U.S.C. §§ 1381-1441) and § 4301 of ERISA (29 U.S.C. § 1451). In that scheme Congress provided in § 4221(a)(1) of ERISA as follows:

> "Any dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under §§ 4201-4219 shall be resolved through arbitration."

Furthermore, whereas here the employer failed to seek to have the dispute arbitrated, an action could be brought in a state or federal court. § 4221(b)(1) provides:

> "If no arbitration proceeding has been initiated pursuant to Subsection (a) the amounts demanded by the plan sponsor under § 4219(b)(1) shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in state or federal court of competent jurisdiction for collection."

Congress further provided in § 4301(c):

> "The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in

> controversy, except that state courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability."

This statutory scheme of MPPAA makes it clear that even though Congress withheld jurisdiction of the federal courts in post-contract contribution collection cases, it provided first for the arbitration of "*any* dispute", and that the federal courts have to enforce that liability. The Petitioner has not directed this court to any provision of MPPAA Amendments from which, either directly or by inference, there is any exception to the scheme to, first, arbitrate these disputes, and to give federal courts jurisdiction to enforce liability if the employer fails to arbitrate.

As discussed below, the circuit courts have uniformly held that if any employer fails to arbitrate, it waives any defense it may have to the assessment of withdrawal liability, except for certain narrow exceptions not present here.

C. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

It is now uniformly recognized that this clear and unambiguous Congressional declaration that "any dispute between an employer and the plan sponsor . . . shall be resolved through arbitration" is mandatory, and is a remedy that an employer is required to exhaust. *IAM National Pension Fund v. Clinton Engines*, 825 F.2d 415 (D.C. Cir. 1987); *Teamsters Pension Fund v. McNicholas Transportation Co.*, 848 F.2d 20 (2nd Cir. 1988); *ILGWU National Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 836

(2nd Cir. 1988); *Central States Pension Fund v. Time D.C.*, 826 F.2d 320 (5th Cir. 1987) *cert. denied*, 284 U.S. 1030, 108 S.Ct. 732; *Flying Tiger Line v. Teamster Pension Fund of Philadelphia*, 830 F.2d 1241 (3rd Cir. 1987); *Marvin Hayes Line, Inc. v. Central States Pension Fund*, 814 F.2d 297 (6th Cir. 1987); *Mason and Dixon Tank Lines v. Central States Pension Fund, et al.*, 852 F.2d 156 (6th Cir. 1988); *Robbins v. Admiral Merchants Motor Freight Co.*, 846 F.2d 1056 (7th Cir. 1988); *Western Teamsters Fund v. Allyn Transportation Co.*, 832 F.2d 504 (9th Cir. 1987).

In *IAM National Pension Fund v. Clinton Engines Corp., supra*, the court had before it the defense that the employer had no obligation to arbitrate because the issue involved a statutory interpretation. The court noted:

> "Thus, Congress' directive is clear. *Any* dispute over withdrawal liability as determined under the enumerated statutory provisions *shall* be arbitrated. Judicial consideration of the disputes is then contemplated in the context of an action by any of the parties to arbitration to "enforce, vacate or modify the arbitrator's award". (Emphasis supplied by the Court).

That same court had earlier decided in *Grand Union Co. v. Food Employers Labor Relations Assn.*, 808 F.2d 66 (D.C. Cir. 1987):

> "Arbitrate first" is indeed a rule Congress stated unequivocally.
>
> . . . .
>
> Initial recourse to arbitration is a statutory direction, one generally to be followed unless neither party timely presses the plea in abatement and the court finds that deferring a court contest while the parties repair to arbitration

> "will neither lead to the application of superior expertise nor promote judicial economy" (at p. 70).

The court, in the most succinct language added:

> In short, arbitration reigns supreme under the MPPAA. And the consequences of failing to arbitrate pursuant to Section 1401(a)(1), 29 U.S.C. § 1401(a)(1), "any dispute concerning a determination made under Section 1381 through 1399" are clearly enunciated by the statute (at page 422).

Section 4221(b) of ERISA (29 U.S.C. § 1401(b)) provides, in pertinent part that if no arbitration proceeding has been initiated pursuant to Section (a) of this Section, the amounts demanded by the plan sponsor "shall be due and owing." The court noted that under this statutory scheme, it was compelled to remand the case before it with instruction to enter judgment in favor of the Trustees, stating:

> "Having failed to initiate arbitration, these employers were barred from raising their defenses in collection actions brought by the fund (at p. 429)."

The Ninth Circuit case of *Western Teamsters Pension Fund v. Allyn, supra,* considered the same issue the Petitioners raise here. The Defendants claimed they had suspended payments pending a labor dispute. The court stated those issues could have and should have been submitted to arbitration, and the failure to do so precluded these employers from raising defenses in the enforcement action.

The Petitioners are mistaken in their claim that the decision below is contrary to the decisions in other circuits. They have not and cannot cite any case from any circuit that either criticizes or fails to follow any of the cases cited above. They lamely cite on page 18 the per curium decision (no opinion) of *Central States Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 816 F.2d 678 (6th Cir. 1987), and *Mason Dixon Tank Lines v. Central States Pension Fund, et al.*, 852 F.2d 156 (6th Cir. 1988). The later Third Circuit case of *Flying Tiger Line v. Teamster Pension Fund of Philadelphia, supra*, distinguished its earlier per curiam order in the *Central States Transport* case, noting that the earlier case involved a party who was never involved in the pension plan (830 F.2d, at 1251).

The contention that the decision below was contrary to the *Mason and Dixon Tank Lines* case is even more tenuous. The Court, at 852 F.2d 163, stated the following:

> "Under the MPPAA, arbitration is not a jurisdictional prerequisite for district court review. *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir. 1988); *Central States Southeast and Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc.*, 826 F.2d 320, 325-28 (5th Cir. 1987); *I.A.M. National Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 417 & n. 4 (D.C. Cir. 1987). Nevertheless, it is the preferred method of dispute resolution under the MPPAA, and normally the initial step preceding judicial intervention. The language of section 1401(a)(1) makes this clear by stating that "[a]ny dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under sections 1381 through 1399 of this title *shall* be resolved

through arbitration." (emphasis added). *Clinton Engines*, 825 F.2d at 417.

The Court then went on to discuss that certain narrow exceptions to this rule, i.e. "facial constitutional challenge", a verifiable claim of irreparable injury (at pg. 165) and a challenge made directly to District Court to determine if a company is "an employer" within the meaning of the act (at p. 167). The petitioners do not assert here and did not assert below that they fell into these exceptions.

The case of *The Park South Hotel v. New York Hotel Trades Council*, 851 F.2d 578 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S.Ct. 493, 102 L.Ed.2d 530 (1988) is also mistakenly relied upon. The court set forth four conditions, enumerated on pg. 20 of the Petition that were present which there obviated the requirement to arbitrate. None of those conditions are present here.

In none of the cases cited by the Petitioners did the court squarely face the issue raised below; that is, can an employer covered by MPPAA ignore the statutory requirement to arbitrate and then subsequently assert in an enforcement action defenses that could have been raised in the arbitration. As we have demonstrated above, that question has uniformly been answered "no".

Finally, it is unfair for the petitioners to contend that the Tenth Circuit's opinion is contrary to the decisions in other circuits dealing with "equitable tolling". The petitioners in the court below did not seek an equitable tolling of the arbitration requirement, did not allege that arbitration was tolled in its Answer nor was equitable tolling raised as a claim in the Pretrial Order. This was

raised for the first time in the Petition for Rehearing, and was suggested to the Petitioners by the Tenth Circuit itself when it observed that had the Petitioner submitted the issue to arbitration, that arbitrator "may, in his discretion, elect to stay proceedings pending resolution of a prior NLRB action." (Appendix A-17 of the Petition).

CONCLUSION

By reason of the foregoing, the Respondent urges that the Petition for Writ of Certiorari be denied.

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APPENDIX TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY VACATION FUND, an express trust, PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, and PIPEFITTERS LOCAL NO. 208, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTINGS INDUSTRY OF THE UNITED STATES AND CANADA,

Plaintiffs,

vs.

HOWARD ELECTRICAL AND MECHANICAL, INC., a Colorado corporation, HOWARD SYSTEMS, INC., a Colorado corporation, and JCON, Inc., a Colorado corporation,

Defendants.

AMENDED COMPLAINT

The Plaintiffs, for a cause of action against the Defendants, state and allege:

JURISDICTION

1. This is an action brought pursuant to Title IV of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. § 1331, *et seq.*].

2. This Court has jurisdiction over this action pursuant to 29 U.S.C. §§ 1145, 1401(b), and 1459 and 28 U.S.C. § 1331.

PARTIES

3. The Plaintiffs are Trustees of the Colorado Pipe Industry Insurance Fund, the Plumbers and Pipefitters Vacation Fund, and the Colorado Pipe Industry Pension Fund, Denver Plumbers Joint Apprentice and Journeyman Training Fund, and the Denver Pipefitters Apprentice and Journeyman Training Fund, each of which is an express trust established and existing for the purpose of providing medical and hospital insurance, vacation pay and benefits, and retirement benefits for employees in the Pipe Industry in Colorado and for training plumbing and pipefitting skills. Each of the said employee benefit funds is a multi-employer plan within the meaning of ERISA [29 U.S.C. § 1002(37)(a)], and the Plaintiff Trustees are beneficiaries of said plans under Section 402(a) of ERISA [29 U.S.C. § 1102(a)].

4. Each of the fringe benefit funds is administered within the State of Colorado and the District of Colorado is the proper venue for this action under Section 502(e)(2) of ERISA [29 U.S.C. § 1132(e)(2)].

5. The Defendant Howard Electrical and Mechanical, Inc., (hereinafter "Howard Mechanical") is a corporation organized and existing under the laws of the State of Colorado and is in an industry affecting commerce as that term is defined in Section 501(1) of the Labor-Management Relations Act of 1947 [29 U.S.C. § 142(1)].

6. The Defendants Howard Systems, Inc. (hereinafter "Howard Systems") and JCON, Inc. are corporations organized and existing under the laws of the State of Colorado and, pursuant to Section 4001(b)(1) of ERISA [29 U.S.C. § 1301(b)(1)], are, with respect to the claim of the Trustees of the Colorado Pipe Industry Pension Fund, deemed to be within a controlled group, and thus each is responsible for the withdrawal liability alleged in the Second Claim.

FIRST CLAIM FOR RELIEF – CLAIM FOR DELINQUENT PAYMENTS

7. On or about January 1, 1984, after reaching an impasse with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208, the Defendant Howard Electrical and Mechanical, Inc. (hereinafter referred to as "Howard") unilaterally implemented the last offer that it had made to these Unions prior to impasse. In that offer, it agreed to pay certain fringe benefits, pension, health and welfare, and vacation benefits and payments into the apprenticeship training funds on behalf of journeymen performing work covered by the contract.

8. Beginning in April of 1984, the Defendant Howard hired a number of journeymen plumbers and journeymen pipefitters to work for it on several projects and to

perform work requiring the skill of licensed and certified journeyman.

9. On or about July 1, 1984, based upon a continuing impasse, the Defendant Howard implemented a new offer, hereinafter referred to as "impasse offer", which provided for the continuation of pension benefits, health insurance benefits, and vacation benefits to journeymen plumbers and pipefitters. The said impasse offer remained in effect until August 20, 1984, at which time modifications of the impasse offer of the Defendant were unilaterally imposed. These modifications terminated the Defendant's obligation to contribute to the Colorado Pipe Industry Pension Fund and declared that it put in its place an optional company profit sharing plan and group medical plan.

10. Between April 1, 1984 and August 20, 1984, the Plaintiffs are informed and believe that the Defendant Howard hired six to eight journeymen plumbers and/or pipefitters. The exact number of persons so hired and the number of hours worked is not known to the Plaintiffs at this time. The Defendant did agree to pay for each hour worked by such persons to the Funds the following:

> To the Colorado Pipe Industry Insurance Fund, $1.25 per hour worked;
>
> To the Colorado Pipe Industry Pension fund, $1.75 per hour worked; and
>
> To the Vacation Fund, the sum of $1.30 per hour worked.

11. The Defendant agreed to pay 13¢ per hour into the apprentice and training fund. As a subterfuge and

motiviated [sic] solely by its desire to conceal its obligation to pay fringe benefits, the Defendant Howard, in violation of its obligation to comply with its impasse offer, classified each of the journeymen hired by it as a pre-apprentice. Under the terms of its impasse offer, only persons who performed work that did not require all of the skills of a journeyman could be classified as pre-apprentices.

12. An audit by a qualified professional accountant is necessary to determine the amount owned by the Defendant.

13. Under the provisions of Section 502(g)(2) of ERISA [29 U.S.C. § 1132(g)(2)], the Plaintiff Trustees are entitled to a judgment against the Defendant Howard Mechanical for an amount to be determined upon an adequate audit, together with interest and attorney's fees.

WHEREFORE, the Plaintiffs as relief for their First Claim pray for judgment as follows:

A. That an order be entered directing the Defendant Howard Electrial [sic] and Mechanical, Inc. to authorize an audit of its books and records to determine the date of hire, wage paid, and work performed by all persons employed by it and performing any plumbing and/or pipefitting work between April 1 and August 20, 1984.

B. That judgment be entered in favor of the Plaintiffs and against the Defendant, Howard Electrical and Mechanical, Inc. for such contributions as an audit shall determine, plus interest.

C. That the Plaintiffs be awarded attorney's fees, costs and such other relief as the Court shall deem just.

SECOND CLAIM – WITHDRAWAL LIABILITY

14. The Plaintiffs reallege and incorporate herein the allegations set forth in Paragraphs 1 through 13 above.

15. Defendant Howard was a party a certain collective bargaining contracts and trust agreements with Unions engaged in the plumbing and pipefitting industry within the State of Colorado, and, under the terms and provisions of the collective bargaining contracts and trust agreements, the Defendant had an obligation to pay pension contributions to the Plaintiffs in an amount specified for each hour worked by each of the Defendant's employees.

16. The last contract to which Defendant Howard was a party expired on May 31, 1983, however its obligation to continue payments into the pension fund continued until the parties reached an impasse, which occurred on December 31, 1983. Thereafter, the Defendant unilaterally implemented several impasse offers, the last of which was on or about August 20, 1984, at which time it ceased its obligations to the fund except with respect to two of its employees, both of whom were terminated by the Defendant on December 31, 1984.

17. The actions of the Defendant constitute a withdrawal from the multi-employer pension plan as withdrawal is defined by Section 4203(b) of ERISA [29 U.S.C. § 1383(b)].

18. Under Sections 4001(b)(1) and 4201 of ERISA [29 U.S.C. §§ 1301(b)(1) and 1381], each of the Defendants is

liable to the Plaintiff Trustees for its share of the unfunded vested benefits of the Plan.

19. Pursuant to Section 4211 of ERISA [29 U.S.C. § 1391] and Section 4202 of ERISA [29 U.S.C. § 1382], the Plaintiff Trustees determined that the Defendant has a withdrawal liability of $555,852.00, and the Plaintiff Trustees established a payment schedule which required that the liability of the Defendant be paid in ten (10) quarterly installments of $63,758.00 with a final payment of $46,814.00. The first quarterly payment was due on July 28, 1986, and the Defendant is now delinquent on the first four installment payments.

20. Defendant Howard was duly notified of the amount of this liability and the amount of its quarterly payments and was notified of its right to arbitrate its withdrawal liability if it chose to do so, but failed to request arbitration within the time required by ERISA [29 U.S.C. § 1399], and, by reason thereof, the first four installments are due and owing. By failing to pay the first four quarterly withdrawal liability payments, the Defendants are, therfore, [sic] delinquent in submitting contributions within the meaning of Sections 515 and 4221(b)(1) of ERISA [29 U.S.C. § 1145 and 29 U.S.C. § 1401(b)(1)]. The Plaintiffs, in bringing this action to enforce Section 515 and Section 4221 of ERISA, are entitled to a judgment against the Defendants for its four (4) unpaid withdrawal liability installments, with interest to the date of judgment, plus costs and expenses incurred in collecting such amounts, including attorney's fees, as provided in Sections 402(g)(2) and 4301 of ERISA [29 U.S.C. §§ 1132(g)(2) and 1451].

WHEREFORE, Plaintiff Trustees pray for judgment in favor of the Plaintiffs and against each of the Defendants in the sum of $255,032.00, plus interest to the date of judgment, such additional sums as the Defendants may owe by reason of future installments, court costs, attorney's fees, other expenses in connection with the collection of this claim, and such other legal and equitable relief as the Court shall deem just and proper.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

THE TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION FUND, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust, TRUSTEES OF THE COLORADO PIPE INDUSTRY VACATION FUND, an express trust, PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, and PIPEFITTERS LOCAL NO. 208, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA,

Plaintiff,

vs.

HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, HOWARD SYSTEMS, INC., a Colorado corporation, and JCON, INC., a Colorado corporation,

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendants Howard Electrical and Mechanical, Inc., and Howard Systems, Inc., answer the Amended Complaint as follows:

FIRST DEFENSE

JURISDICTION

1. Deny.

2. Deny.

PARTIES

3. Defendants have insufficient information to form a belief as to the truth of the averments herein and therefore deny the same.

4. Defendants have insufficient information to form a belief as to the truth of the averments herein and therefore deny the same.

5. Admit.

6. Deny as to Defendant Howard Systems, Inc., except admit that it is a corporation organized and existing under the laws of the State of Colorado. Defendants have insufficient information with respect to the named Defendant JCON, Inc., to form a belief as to the truth of the averments with respect thereto, and therefore deny the same.

FIRST CLAIM FOR RELIEF –
CLAIM FOR DELINQUENT PAYMENTS.

7. Admit.

8. Deny.

9. Deny.

10. Deny.

11. Deny.

12. Deny.

13. Deny.

SECOND CLAIM - WITHDRAWAL LIABILITY

14. The Defendants incorporate as their answer hereto the answers set forth in paragraphs 1 through 13 above.

15. Admit.

16. Admit that the last contract to which Defendant Howard Electrical & Mechanical, Inc., was a party expired on May 31, 1983. Deny all other allegations in paragraph 16 of the Amended Complaint.

17. Deny.

18. Deny.

19. Deny.

20. Admit that Defendant Howard Electrical & Mechanical Inc. was notified of the asserted amount of the claimed liability, a copy of which notice is attached to the Answer to the original Complaint herein and is incorporated herein by this reference, and admits that it did not request arbitration, but deny each and every other allegation contained in paragraph 20 of the Amended Complaint. Defendants affirmatively state that Defendant Howard Electrical & Mechanical, Inc. had and has no legal obligation to request arbitration.

SECOND DEFENSE

The Amended Complaint fails to state a claim against the Defendants in either or both of the First and Second Claims for Relief upon which relief can be granted.

THIRD DEFENSE

With respect to the Second Claim-Withdrawal Liability in the Amended Complaint, the obligation of Howard Electrical & Mechanical, Inc. to contribute under the Plan has not ceased. Consequently, there has not been a withdrawal from the Plan by the Defendant as defined by 29 U.S.C. § 1383(b); the provisions of 29 U.S.C. §§ 1391, 1382, 1399, 1145 and 1401 are inapplicable; and Plaintiff is not entitled to the relief sought herein.

The reasons Defendant's obligation to contribute under the Plan has not ceased include, but are not limited to, the following:

(a) The Defendant enter into a settlement agreement approved by the National Labor Relations Board in October 1984, which required Defendant to make all contributions called for by the Plan notwithstanding the expiration of the collective bargaining agreement on May 31, 1983;

(b) Pursuant to the settlement agreement, Defendant paid arrearages to the Plan through November 1984, and paid pension benefits for two of its employees performing covered work through December 31, 1984;

(c) The settlement agreement is still in full force and effect;

(d) Any suspension of contributions by Defendant under the Plan has occurred during a labor dispute involving Defendant's employee. Pursuant to 29 U.S.C. § 1398, the Defendant shall not be considered to have withdrawn from the Plan solely because it suspended contributions to the Plan during such labor dispute;

(e) Such labor dispute is continuing as of this date; and

(f) The Defendant has not taken any definite steps to cease participating in the Plan.

FOURTH DEFENSE

There now exists a collective bargaining agreement between Pipefitters, Local Union No. 208, and Plumbers, Local Union No. 3, pursuant to which Defendant Howard Electrical & Mechanical Inc.'s obligations under the Plan continue to exist.

FIFTH DEFENSE

Any withdrawal liability as claimed in the Second Claim-Withdrawal Liability, against the Defendant under the Plan has been waived, reduced or abated pursuant to 29 U.S.C. § 1387, and the regulations and rules prescribed and adopted in accordance therewith.

SIXTH DEFENSE

Plaintiffs are collaterally estopped from denying the validity of the lawful proposals for and implementation of terms at impasse in collective bargaining negotiations

between Howard Electrical & Mechanical, Inc. and Pipefitters Local Union No. 208 and Plumbers Local Union No. 3, as set forth in the decision of Federal Administrative Law Judge Jerold H. Shapiro, dated April 8, 1987. The said decision of said Administrative Law Judge confirms the lawful implementation of its pre-impasse offer permitting it to classify employees as pre-apprentices, employ pre-apprentices in any work they have the skills and ability to perform, without limitation, and concerning whom the obligation to make Plan contributions during the impasse period was suspended, and which confirmed the legality of such conduct under the National Labor Relations Act, as amended, 29 U.S.C. § 158, *et seq.*

WHEREFORE, Defendants pray that the Complaint and both the First and Second Claims for Relief be dismissed with prejudice, and that Defendants be awarded their costs, reasonable attorney's fees, and for such other and further relief as the Court may deem proper.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY
Professional Corporation

By /s/ Earl K. Madsen
Earl K. Madsen
1717 Washington Avenue
Golden, Colorado 80401
(303) 278-3300

Attorneys for Defendant

Defendants' Address:

6701 West Alameda Avenue
Denver, Colorado 80226

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of October, 1987, I have placed a true and correct copy of the foregoing ANSWER TO AMENDED COMPLAINT in the United States mail, first-class postage prepaid, properly addressed to:

James C. Fattor, Esq.
Hornbein, MacDonald and Fattor, P.C.
1600 Broadway, Suite 1900
Denver, Colorado 80202

/s/ _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust, et al.,

Plaintiffs,

vs.

HOWARD ELECTRICAL AND MECHANICAL, INC., a Colorado corporation, et al.,

Defendants.

PRE-TRIAL ORDER

(Filed April 18, 1988)

I. DATE AND APPEARANCES

The pre-trial conference before Magistrate Richard B. Harvey was scheduled for March 15, 1988, at 10:15 a.m., at which time the schedule for submission of this Pre-Trial Order was established for March 30, 1988. Plaintiffs' counsel is James C. Fattor of Hornbein, MacDonald & Fattor, P.C. Defendants' counsel is Earl K. Madsen of Bradley, Campbell & Carney.

II. JURISDICTION

Jurisdiction of this Court over this proceeding under Title IV of the Employee Retirement Income Security Act of 1974, as amended, 20 U.S.C. § 1331, and in particular section 1132(g)(2) (section 502(g)(2)), 1145 (section 515) is contested by Howard. Howard submits the instant claims

are preempted and collaterally estopped by the pending National Labor Relations Act proceedings.

III. CLAIMS AND DEFENSES

A. Plaintiffs' Claims

Defendant Howard Electrical & Mechanical, Inc., (hereinafter referred to as "Defendant Howard") was a signatory to several collective bargaining agreements with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 of Denver, Colorado (hereinafter referred to as the "Unions"). Those union contracts, which had incorporated within them certain trust agreements providing for health and welfare, pension and vacation benefits for persons covered by the contracts, obligated Defendant Howard to pay fringe benefit contributions into the Insurance Fund, the Pension Fund and the Vacation Fund. The last contract signed by Defendant Howard expired on May 31, 1983. Negotiations for a new contract reached an impasse on December 31, 1983, at which time the Defendant implemented its last offer (hereinafter referred to as its "impasse offer"). Under that offer, the Defendant was obligated to make pension benefit contributions for journeymen plumbers and pipefitters then in its employ; but, under that offer, had no obligation to make any contributions for such benefits to journeymen subsequently hired by the Defendant. On December 31, 1984, Defendants Howard Terminated the employment of the three (3) journeymen employed by the Defendant at that time the Defendant imposed its impasse offer and has made no further contributions.

Pursuant to the provisions of sections 1402 and 1411 of ERISA, 29 U.S.C. §§ 1382 and 1391, respectively, the Trustees of the Pension Fund determined that the Defendant had withdrawn from the Fund and that there was unfunded vested liabilities it owed in the amount of $555,852.00, payable in quarterly installments of $63,758.00, with a final installment of $46,814.00. The Defendant has failed to make any payments. Although the statute gives the Defendant the right to arbitration of all issues between the parties, the Defendant chose not to seek an arbitration. It has made no quarterly payments and has refused to pay any part of the withdrawal liability.

The Plaintiffs also brought this action against Howard Systems, Inc., and JCON, Inc. (designated as "JACORE, Inc., in the Amended Complaint), under section 4001(b)(1) of ERISA, 29 U.S.C. § 1301(b)(1), as corporations within a control group and, thus, liable under the statute. Defendant Howard is a wholly-owned subsidiary of Howard Systems, Inc., and thus, the latter is liable under this section of the statute. The Plaintiffs hereby dismiss any claim against JCON, Inc.

The Plaintiffs also seek to recover delinquent contributions covering a short period of time, from July 1, 1984, to August 20, 1984. This claim is based upon Defendant Howard's modified impasse offer of July 1, 1984, in which the Defendant agreed to make the following contributions: $1.25 per hour worked to the Colorado Pipe Industry Insurance Fund, $1.75 per hour worked to the Colorado Pipe Industry Pension Fund, and $1.30 per hour worked to the Colorado Pipe Industry Vacation Fund. In addition, the Defendant agreed to withhold and pay to

the unions working dues for its journeymen. On August 15, 1984, the Defendant again modified its impasse offer and ceased its obligation with respect to the payment of these fringe benefits. Consequently, the Plaintiffs seek to recover from the Defendant health, welfare, pension and vacation contributions and union dues for journeymen hours worked for July 1, 1984, to August 20, 1984. The Plaintiffs request that the Court order an accounting of the Defendant's books and records for the purpose of determining the amount of this liability.

The Plaintiffs pray for a judgment against Defendant Howard in the sum of $555,852.00, plus interest and attorney's fees on the claim for withdrawal liability and, with respect to the claim for fringe benefits due for the period July 1, 1984, to August 20, 1984, the Plaintiffs demand that the Court order an audit to determine the amount of this liability and a judgment in the amount of the liability as determined by the audit, plus interest and attorney fees.

B. Defendants' Claims

This lawsuit is an effort by Plan Trustees to enforce the collective bargaining position of two unions, Plumbers Local Union No. 3 and Pipefitters Local No. 208 who in the past had collective bargaining agreements with Howard Electrical and Mechanical, Inc. ("Howard") which required fund contributions by Howard for covered employees. The Trustees have brought this suit on the theory that Howard did not bargain in good faith and unlawfully reached an impasse in collective bargaining negotiations with the two unions on or about August 20,

1984. Both the First and Second Claims for Relief in the Trustees' Complaint before this Court are based on this asserted unlawful bargaining under the National Labor Relations Act, as amended, 29 U.S.C. § 141, *et seq.*, by Howard.

Previously, the unions, Plumbers Local No. 3 and Pipefitters Local No. 208, submitted this identical claim for that identical alleged unlawful bargaining on the identical August 20, 1984, "facts," which claims were dismissed by the National Labor Relations Board ("NLRB") Administrative Law Judge, Shapiro, in April 1987. Judge Shapiro after full opportunity to litigate such claims, determined that there was no evidence of an unlawful implementation of the asserted Howard bargaining proposal of August 20, 1984, and dismissed the claims.

This action is a collateral attack upon that decision of Judge Shapiro. The decision of Judge Shapiro is currently pending on appeal to the National Labor Relations Board. Judge Shapiro's decision fundamentally confirmed the post-agreement expiration lawful bargaining of Howard with Plumbers Local No. 3 and Pipefitters Local No. 208 under the National Labor Relations Act. Further, the decision discusses the continuing bargaining engaged in by Howard with both said Locals, in the period 1985 and 1986, including proposals by Howard as early as July 1985 to break an impasse in bargaining between the parties on the basis of which Howard would be obligated to continue its contributions to the Plaintiff plans. Local Nos. 3 and 208 refused to accept the Howard proposals, unilaterally asserted their own "impasse" in negotiations

in August 1985, but have continued some negotiations with Howard to this date.

The action takes the form of legal proceedings under sections 502(g)(2) and 515 of ERISA to collect delinquent contributions, and withdrawal liability payments concerning the plans, based on the asserted unlawful bargaining engaged in by Howard in violation of the National Labor Relations Act. However, Howard has never defaulted on any promised contributions on the basis of any agreements with either of the local unions, and thus the Trustees have no basis under the cited sections of ERISA for such a claim of delinquent contributions. Further, the post-agreement expiration bargaining by Howard has been confirmed to be lawful under the National Labor Relations Act, and such negotiations as referenced in Judge Shapiro's Decision, have continued even to this date.

In summary, the position of Howard is that it has never defaulted on any promised contributions to the Fund. Further, for a time in the post-agreement expiration negotiation period, it suspended contributions to the Fund as is its right under ERISA, 29 U.S.C. § 1398(2). This provision expressly authorizes an employer to suspend contributions under the plan during a labor dispute involving its employees, and particularly in the post-agreement negotiation period. Howard has agressively [sic] bargained to attempt to obtain its proposals in negotiations, in 1985, and thereafter, and have proposed impasse breaking terms of agreement as early as July 1985 reestablishing in full its contribution obligations and payments.

Resolution of the claims asserted in the instant proceeding of unlawful bargaining by Howard under the National Labor Relations Act by alleged impasse proposals of August 20, 1984, are for the exclusive jurisdiction of the National Labor Relations Board, and not this Court under ERIRA. These claims asserted in this Court are preempted under and are subject to the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act, as amended.

IV. STIPULATIONS

A. The Colorado Pipe Industry Pension Fund is an express trust established and existing for the purpose of providing retirement benefits for employees in the plumbing and pipefitting industry in the State of Colorado. The Plaintiffs have, pursuant to law, established a pension plan, which is a multi-employer plan within the meaning of section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a), and the Plaintiff [sic] are named fiduciaries of the plan under section 402(a) of ERISA, 29 U.S.C. § 1102(a).

B. The Colorado Pipe Industry Insurance Fund is an express trust established and existing for the purpose of providing health and welfare benefits for employees in the plumbing and pipefitting industry in the State of Colorado. The Plaintiffs have, pursuant to law, established an insurance plan, which is a multi-employer plan within the meaning of section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a), and the Plaintiffs are named fiduciaries of the Plan under section 402(a) of ERISA, 29 U.S.C. § 1102(a).

C. Defendant Howard Electrical & Mechanical, Inc., is a corporation organized and existing under the laws of the State of Colorado, and it and its employees are in, and engaged in an industry affecting commerce as that term is defined by section 501(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 142(a).

D. Defendant Howard Systems, Inc., is a Colorado corporation which owns one hundred percent (100%) of the stock of Defendant Howard Electrical & Mechanical, Inc.

E. On May 1, 1981, Defendant Howard and Plumbers Local Union No. 3 and Pipefitters Local Union No. 208, both of Denver, Colorado (hereinafter referred to as the "Unions"), entered into a collective bargaining agreement, and a trust agreement incorporated therein (hereinafter referred to as the "contract"), requiring Defendant Howard to make pension contributions to the Colorado Pipe Industry Pension Plan at a specified rate for each hour worked by each of the Defendant's employees. These contracts expired on May 31, 1983.

F. After termination of the contract, both parties attempted to negotiate a new collective bargaining agreement, but were unable to do so and reached impasse on December 31, 1983, at which time the Defendant implemented its impasse offer.

G. Under its impasse offer, Defendant Howard made vacation, insurance and pension contributions to the Plans for journeymen plumbers and pipefitters in its employ as of and through December 31, 1984. On December 31, 1984, those journeymen, plumbers and pipefitters which had been in its employ as of the contract expiration

on December 31, 1983, (Messrs. Pike, Lansville and Murphy) left their employment with Howard. Howard thereafter made no payments to the Plaintiffs, except for tendered contributions, rejected by Plaintiffs in 1987.

H. Howard has continued, to the extent it successfully bid for and obtained work and it continues to bid for work, to perform work in the jurisdiction for which contributions were required under the terms of the previously expired collective bargaining agreement (May 31, 1983).

I. The Colorado Pipe Industry Pension Plan is a multi-employer pension plan within the meaning of section 3(37)(a) of ERISA, 29 U.S.C. § 1002(37)(a), established for the purpose of providing retirement benefits to employees in the plumbing and pipefitting industry in Colorado. The Plaintiff Trustees are named fiduciaries of the Colorado Pipe Industry Pension Plan under section 402(a) of ERISA, 29 U.S.C. § 1102(a).

J. The Plaintiffs determined that Defendant Howard had withdrawn, effective December 31, 1984, and they assessed withdrawal liability under section 4201 of ERISA, 29 U.S.C. a 1381, in the amount of $555,852.00 as of that date. On or about May 29, 1986, the Plaintiffs notified Defendant Howard of its claimed withdrawal liability and informed the Defendant that it was required to pay that withdrawal liability in ten (10) quarterly payments of $63,758.00, with a final payment of $46,814.00. The Plaintiff Trustees also notified Defendant Howard under their claims that its first quarterly payment was due on July 28, 1986.

K. Defendant Howard has made no payments towards the $552,852.00 in withdrawal liability billed by the Plaintiffs, and Howard states it has no such withdrawal liability since Howard responded to the Fund on July 17, 1986, that it had not withdrawn from the Fund or Plan.

L. Defendant Howard has made no request to arbitrate the Plaintiffs' assessment of withdrawal liability under ERISA, 29 U.S.C. § 1399. Howard states it had no duty or obligation to request such arbitration since it has not withdrawn from the Fund or Plan, since Howard claims the arbitrator is not empowered to engage in statutory construction of ERISA including the interpretation of the labor dispute provisions of that Act set forth in 29 U.S.C. § 1398(2), and because Howard claims the arbitrator is not empowered to determine issues of preemption of the asserted ERISA claims of the Trustees under the terms of the National Labor Relations Act and under the primary jurisdiction of the National Labor Relations Board.

M. If the Court finds that it has jurisdiction over these proceedings under ERISA, 29 U.S.C. § 1381, *et seq.*, then venue is proper in this Court.

V. PENDING MOTIONS

A. Filed by Plaintiffs:

1. Motion to Compel Payment of Delinquent and Future Installments of Withdrawal Liability Pursuant to 29 U.S.C. §§ 1399 and 1401, filed October ___, 1987.

2. Plaintiffs' Motion for Summary Judgment on Plaintiffs' Second Claim for Relief, filed December 11, 1987.

B. Filed by Defendant:

1. Motion for Summary Judgment, filed on or about April 29, 1987; Defendant Howard will submit its Supplemental Memorandum on or before May 1, 1988. Plaintiffs will submit a response to the Defendants' Motion on or before May 1, 1988.

VI. WITNESSES

A. Plaintiffs' Witnesses:

1. The Plaintiffs will call the following witnesses at trial:

a. Leon H. Land, Fund Administrator, Compusys, Inc. of Colorado, 1313 Tremont Place, Suite 201, Denver, Colorado 80204, telephone number (303) 595-4617.

2. The Plaintiffs may call the following witnesses at trial:

b. Jack Howard, President of Defendant Howard, 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456, for cross-examination.

c. Stanley Plucheck and Roland Herdine, representatives of Defendant Howard, 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456, for cross-examination.

d. Paul E. Emrick, Business Manager of Plumbers Local Union No. 3, and Chairman of the Board of Trustees of the Colorado Pipe Industry Pension Plan, 360 Acoma Street, Room 316, Denver, Colorado 80223, telephone number (303) 722-2333.

e. Dale M. Camblin, Business Manager of Pipefitters Local Union No. 208, 6350 Broadway, Denver, Colorado 80216, telephone number (303) 428-4380.

f. The Plaintiff reserve the right to add additional witnesses upon reasonable notice.

g. Thomas G. Pike, 117 South Quay, Denver, Colorado 80226, telephone number 237-1075; Frank Lansville, 12806 West 61st Place, Arvada, Colorado 80004, Michael Murphy, 6110 West 73rd, Arvada, Colorado 80003.

h. Any witnesses listed by another party.

i. Any witness for rebuttal or impeachment purposes.

3. The Plaintiffs will call the following *expert* witnesses at trial:

a. Miquel A. Padro, Enrolled Actuary No. 146, Vice President of the Martin E. Segal Company, 57 Post Street, Suite 900, San Francisco, California 94194, telephone number (415) 392-0930, who will testify as to the calculations of the Defendant's withdrawal liability.

B. Defendant's Witnesses.

1. The Defendant may call the the following witnesses at any trial of the asserted claims.

a. Any or all of the current Plaintiff Trustees, or those who served as Trustees as of May 29, 1986. The address of such Trustees is 1331 Tremont Place, Suite 201, Denver, Colorado 80204, telephone number (303) 595-4617.

b. Mr. James P. Hendricks, 1500 Merabank Tower, 3003 North Central Avenue, Phoenix, Arizona, 85012-2964.

c. Mr. Richard Arnold, corporate counsel, Howard Electrical and Mechanical, Inc., 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456.

d. Mr. Timothy M. Bowman, Howard Supervisor/Project Manager, 6701 West Alameda Avenue, Lakewood, Colorado 80226, telephone number (303) 232-1456.

e. Any witness listed by Plaintiff.

f. Any witness for rebuttal for impeachment purposes.

2. The Defendant Howard may call the following *expert* witness at trial.

a. Mr. Ray Pinchkowsky, Milliman & Robertson, 370 Seventeenth Street, Suite 2250, Denver, Colorado 80202. Mr. Pinchkowsky may testify as an expert witness concerning such plan or Fund contributions, required calculations and withdrawal liability, as a rebuttal witness to Plaintiffs' expert, Mr. Padro. Further, Mr. Pinchkowsky may testify as an expert witness that plan information supplied by Plaintiffs in response to requests from Defendants' counsel is insufficient to verify

the amount of claimed contributions due, or the amount of claimed withdrawal liability due, even on the assumptions in Plaintiffs' Amended Complaint. Lastly, Mr. Pinchkowsky may testify as an expert witness that the amount of past contributions and withdrawal liability asserted by Plaintiffs cannot be assessed as of the date of the claim for such, but rather, only on a current basis, in compliance with the Pension Guarantee Corporation opinions and regulations adopted under ERISA.

C. Written summaries of opinions of expert witnesses and a description of expert's qualifications may be provided to opposing counsel no late than *thirty (30) days* after the entry of the Pre-Trial Order. The names of any additional witnesses may be disclosed to opposing counsel within ten (10) days of their becoming known or their existence should have become known. In addition, a final written list of witnesses must be filed at the Status Conference referred to in Section XIII(B).

VII. EXHIBITS

A. The Plaintiffs will offer any or all of the following exhibits at trial.

1. Collective Bargaining Contract, including the applicable Trust Agreement, effective May 1, 1981, through May 21, 1983.

2. Letter from the Colorado Pipe Benefit Trust Funds to Defendant dated May 29, 1986, and Exhibits I through IV attached thereto, initially notifying the Defendant of the amount of this withdrawal liability.

3. Letter from James P. Hendricks, Kaplan, Jacobwitz, Byrnes, Rosier & Hendricks, to the Board of Trustees of the Colorado Pipe Industry Pension Fund, dated July 17, 1986, requesting that the Trustees review their determination as to withdrawal liability.

4. Letter from James C. Fattor, Hornbein, MacDonald and Fattor, dated September 24, 1986, responding to James P. Hendricks' correspondence of July 17, 1986.

5. Letter from James P. Hendricks, Kaplan, Jacobwitz, Byrnes, Rosier & Hendricks, to Leon H. Land, Fund Administrator of the Plaintiffs, dated November 13, 1986, informing the Plaintiff that Defendant Howard has executive contracts with the unions as of November 5, 1986.

6. Letter from James C. Fattor, Hornbein, MacDonald and Fattor, to Howard Electrical & Mechanical, Inc., dated December 17, 1986, regarding its failure to make its first two quarterly withdrawal liability installment payments due on July 28, 1986, and on October 1, 1986.

7. Letter from Roland C. Herdine, Vice-President of Defendant Howard, to the Pipe Industry Trust Funds, dated March 12, 1987, inquiring about a $592.38 check to the Plaintiffs refunded to the Defendant.

8. Letter from James C. Fattor, Hornbein, MacDonald and Fattor, to Mr. Roland C. Herdine of Defendant Howard, dated March 26, 1987, notifying the Defendant that there is no contract with the unions and that it is illegal for the funds to accept contributions.

9. Decision of Administrative Law Judge, Jerrold H. Shapiro, of the National Labor Relations Board Branch Office in San Francisco, California, dated April 8, 1987, regarding Cases, 27-CA-8889, 27-CA-8889-2, and 27-CA-8924 of Howard Electrical and Mechanical, Inc. and Plumbers Local Union No. 3 and Pipefitters Local Union No. 208.

10. Payroll records of Defendant Howard for the period January 1985 to the present.

11. Defendant Howard's contract impasse offer of December 31, 1983.

12. Letter from Defendant Howard to the unions of June 18, 1984, and modified impasse offer.

13. Letter from Defendant Howard to the unions of August 15, 1984.

14. Any exhibits listed by any other party.

B. The Defendant may offer any of all the following exhibits at trial.

1. The Collective Bargaining Contract for the period May 1, 1981, through May 31, 1983, between Howard and Plumbers Local No. 3 and Pipefitters Local No. 208, including the applicable Trust Agreement.

2. Documents concerning the negotiation history between Howard and Plumbers Local No. 3 in the period March 1983 through January 1984, including the following documents:

a. Union request for negotiations, March 3, 1983;

b. Daily journal entry, April 17, 1983;

c. Union proposal, special helper category, March 9, 1983, June 2, 1983;

d. Howard's request in negotiations, March 11, 1983;

e. Howard's list of negotiators, March 22, 1983;

f. Minutes, collective bargaining sessions, first through sixth sessions;

g. Howard's bargaining proposals March 23, 1983, May 19, 1983, June 2, 1983, July 6, 1983, December 29, 1983, plus incidental correspondence.

3. Negotiation history – Pipefitters Local No. 208, March 1983 through January 1984, including:

a. Proposal for negotiations, May 3, 1983;

b. Howard letter requesting negotiations, individual basis, March 11, 1983;

c. Union's negotiation committee, March 23, 1983;

d. Howard's negotiators, March 22, 1983;

e. Minutes of all bargaining sessions, first through eleventh session;

f. Howard proposals in such negotiations, March 22, 1983, May 19, 1983, June 28, 1983, December 30, 1983, and incidental correspondence.

g. Union's proposed agreement (special journeymen), June 1, 1983.

h. Union proposal of April 15, 1983.

i. Howard telegrams to union, December 23, 1983, January 16, 1984;

j. Union's letter, December 30, 1983; telegram, January 11, 1984.

4. Negotiation history, Plumbers Local No. 3, 1984, including:

a. Howard proposal, June 19, 1984, union rejection dated June 27, 1984;

b. Howard's letter dated August 15, 1984, union's rejections letter dated August 16, 1984;

c. Howard, fund contribution records 1984, inclusive of all employees, as such records relate to collective bargaining negotiations in the period.

5. Negotiation history, Pipefitters Local No. 208, 1984, including:

a. Howard's letter dated June 19, 1984 and proposal;

b. Howard's letter to local, August 15, 1984;

c. Howard's letter to union, January 26, 1984;

d. Howard fund contribution records 1984, inclusive of all employees, as it may relate to 1986 bargaining negotiations.

e. Union correspondence relating to (a) through (c) above.

6. Joint negotiations, history, 1985, including:

a. Joint negotiation minutes of all sessions, first through sixth session;

b. Howard proposals, July 11, 1985, July 17, 1985, July 31, 1985, October 11, 1985;

c. Joint union proposal, March 22, 1985;

d. Union correspondence, August 7, 1985;

e. Howard's responses to union correspondence, August 27, 1985;

f. Hendricks' letter, September 10, 1985, threatening unfair labor practice charges;

g. Plumbers Local No. 3 response, September 18, 1985; and Pipefitters Local No. 208 response, September 20, 1985;

h. Howard's letter and proposals dated October 11, 1985 to Plumbers Local No. 3 and Pipefitters Local No. 208;

i. Hendricks' letter, October 2, 1985;

j. Correspondence relating to the above through December 1985;

k. Personnel records 0 Dockum – 1985.

7. Negotiation history, 1986, including:

a. Hendricks' letter, June 24, 1986;

b. Fund letter, May 29, 1986;

c. Fund letters October 8, 1984 and November 6, 1984;

d. Hendricks' letter to fund, July 17, 1986;

e. Fattor letter in response to Hendricks', September 24, 1986;

f. Howard's letter of November 5, 1986 accepting union's previous March 22, 1985 proposal in its entirety;

g. Union's November 12 and 13, 1986, letters (Plumbers Local No. 3 and Pipefitters Local No. 208 respectively) in response to Howard's letter of November 5, 1986;

h. Howard's November 26, 1986 letter;

i. Union's letter of December 2, 1986.

8. Negotiation, 1987, including:

a. Tendered contribution checks incident to November 1986 acceptance of union's contract proposal by Howard, three checks dated February 12, 1987;

b. Tendered fund forms in conjunction with contribution checks dated February 1987;

c. Fund separate checks returning contributions dated March 1987;

d. Fund correspondence to Howard through fund counsel dated March 12 and 13, 1987;

e. Herdine letter to Fund dated March 12, 1987 and Fattor response dated March 26, 1987;

f. Howard's March 30, 1987 telegram request to unions requesting craftsman to be supplied from hiring hall and unions response declining request;

g. Union's April 1, 1987 proposal;

h. Howard's responses to union proposals of April 1, 1987, dated April 28;

i. Union responses dated May 7, 1987;

j. Howard's response to union's letter of May 7, dated June 2, 1987;

k. Plumbers Local No. 3, negotiation proposal, September 16, 1987;

l. Agreement between the parties, dated October 27, 1987;

m. Howard's NLRB charges, case no. 27-C-2425 and (2).

9. Decision of NLRB Administrative Law Judge Shapiro, Case Nos. 27-CA-8889, 8889-2, 8924, April 1987, settlement agreements, NLRB, same charges, October 17, 1984.

10. Murphy, Lansville, NLRB Charge, 27-CA-9085, v. Howard; NLRB letter dismissing charge dated February 2, 1986; NLRB General Counsel, dismissal of appeal re charge, August 15, 1986.

VIII. DISCOVERY

Discovery has not yet been completed. The Plaintiffs will depose any expert of Defendant Howard following the receipt of a report from said witness.

The Defendant will depose certain Trustee(s) and Fund Administrator concerning assertion that they conducted some independent investigation relating to the

existence of the labor dispute under the Act, 29 U.S.C. § 1398(2) herein, prior to issuance of the Fund letter to Howard dated May 29, 1986.

IX. SPECIAL ISSUES

A. Several Motions of both the Plaintiffs and the Defendant are still pending.

B. A special issue is whether this proceeding is preempted or collaterally estopped by the current and pending NLRB proceedings between Howard, Pipefitters Local No. 208, Plumbers Local No. 3, and counsel for the General Counsel for the National Labor Relations Board. This includes the issues re termination of journeymen Murphy, Lansville and Pike, where the NLRB refused to issue a complaint on their NLRB charges of unlawful termination by Howard.

C. A special issue is whether Defendant Howard is bound by the asserted determination of the Plaintiffs as to the amount of alleged withdrawal liability, for not arbitrating same, and whether there is any statutory duty to arbitrate such issues involving the labor dispute statutory exemption, 29 U.S.C. § 1398(2), and claims of preemption under the National Labor Relations Act.

X. OFFER OF JUDGMENT

Counsel acknowledge familiarity with the provisions of Rule 68 of the Federal Rules of Civil Procedure (Offer of Judgment) and have discussed with the clients against whom claims are made in this case.

XI. EFFECT OF PRE-TRIAL ORDER

A. Counsel acknowledge familiarity with the provisions of Rule 16 of the Federal Rules of Civil Procedure (Pre-trial Procedures; Formulating Issues).

B. Hereafter, this Order will control the subsequent course of this action, and the trail [sic] may not be amended except by consent of the parties and approval by the Court or by Order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this Order, reference may be made to the records of the Pre-Trial Conference to the extent reported by stenographic notes and to the pleadings.

XII. AMENDMENTS TO THE PLEADINGS

A. To the extent it is not contained within the Sixth Defense of Howard, in answer to the Amended Complaint, Howard moves to add a Seventh Defense that the First and Second Claims for Relief in the Amended Complaint fail to confer subject matter jurisdiction upon this Court, since such claims are preempted by the exclusive and primary jurisdiction of the National Labor Relations Board under the National Labor Relations Act, as amended, 29 U.S.C. §§ 141, *et seq.*, and particularly section 158(a)(5) thereof.

XIII. TRIAL AND ESTIMATED TRIAL TIME; STATUS CONFERENCE

A. Trial is to this Court, and the estimated trial time is three (3) days.

B. A status conference will be held by the Court no later than thirty (30) days before the trial date. At this Status Conference, counsel are directed to file a final list of all exhibits and witnesses. The Court may also consider motions in limine, if any, on particular issues and other maters [sic] to expedite the trial.

DATED this 15th day of April, 1988.

Respectfully submitted,

HORNBEIN, MCDONALD & FATTOR, P.C.

By /s/ Jim Fattor
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1717 Washington Avenue
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(303) 278-3300

Attorneys for
Howard Electrical &
Mechanical, Inc.

The above and within Pretrial Order is entered and dated in Denver, Colorado this 18th day of April, 1988.

BY THE COURT

/s/ Richard B. Harvey
RICHARD B. HARVEY
United States Magistrate

PIPE INDUSTRY BENEFIT TRUST FUNDS

(SEAL) 1313 Tremont Pl., Suite 201 (SEAL)

Denver, Colorado 80204

Telephone (303) 595-4617

May 29, 1986

Howard Electric & Mechanical Company
P.O. Box 26800
Lakewood, Colorado 80226

Gentlemen:

Our records indicate that you have not contributed to the Colorado Pipe Industry Pension Fund ("Plan") since December 31, 1984. We are further advised that negotiations for a new collective bargaining agreement have reached impasse.

Based upon this information, we conclude that you have withdrawn from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 ("ERISA").

Pursuant to the provisions of this 1980 Statute and the implementing regulations promulgated by the Pension Benefit Guaranty Corporation, the Board of Trustees of the Plan have adopted certain methods of calculating the withdrawal liabilities applicable to participating employers who withdraw. These calculations are summarized on the attached forms. They indicate that your withdrawal liability amounts to $555,852.00. Demand is hereby made for payment of all such liability in accordance with the following schedule.

You may pay the withdrawal liability set forth in the preceding paragraph by a single lump sum payment within 60 days after your receipt of this letter.

Should you choose not to pay in a lump sum, the Act requires that the Trustees establish your schedule of payments based on the average annual hours of contributions for the three consecutive years of highest number of hours for which contributions were required during the previous ten years, multiplied by the highest amount per hour contribution made by you prior to your withdrawal. The result is an annual payment of $255,030.00 payable in quarterly installments of $63,758.00. Your first payment is due on July 28, 1986. Future payments are due on the first day of each quarter for the next nine (9) quarters. The final payment is for $46,814.00.

Should you fail to make your first monthly payment by its due date, or should you fail to make any subsequent monthly payments when due, ERISA, as amended, provides that you will incur interest charges from the date your payment becomes due until the date payment is finally received. Additionally, you may incur liability for liquidated damages and other sums assessed under the delinquency provisions of the Plan's Trust Agreement, and your obligation may be subject to such additional steps as the Trustees may require in accordance with the law.

More importantly, should you fail to pay any payment, plus interest, within 60 days after receiving written notice from the Plan that such payment is delinquent, or should you commit any other act which the Plan deems to constitute a "default" in your payment obligations, ERISA, as

amended, provides that the Board of Trustees may hold you liable for immediate payment of the entire outstanding amount of your withdrawal liability, including any interest which may be assessed on that total amount, from the due date of the first payment which was not timely made. It the Plan has to sue to collect such withdrawal liability, the Act requires the Court to award to the Plan its costs, attorney's fees, interest and liquidated damages.

Within 90 days from the date you receive this notice, you may:

(1) Request the Trustees to review any specific matter relating to the determination of your company's liability and payment schedule;

(2) Identify to the Trustees any claimed inaccuracy; and

(3) Furnish the Trustees with any additional relevant information.

The Plan will review any matter raised by you, and you will subsequently be notified of the Plan's decision, the basis for the decision and the reason for any change in the determination of your liability or your liability payment schedule. *You are required by the Act to make the payments set forth in this letter on a timely basis, notwithstanding any request for review of appeal of the determination of the amount of your liability payment schedule.* Any adjustments to your liability will be reflected in your future payments.

This letter is intended to provide you with notice of your liability and payment obligations under ERISA, as

amended. It is not intended as an explanation of the Statute, nor should it be construed as limiting in any way the rights of the Plan under the Statute.

Sincerely,

THE BOARD OF TRUSTEES,
COLORADO PIPE INDUSTRY PENSION FUND
/s/ L. H. Land
Leon H. Land
Fund Administrator

Enclosure

copy to: All Trustees
Hornbein, MacDonald, & Fattor, P.C.
Martin E. Segal Company

LHL:um
opeiu #5
afl/cio

LAW OFFICES

KAPLAN, JACOBOWITZ, BYRNES,
ROSIER & HENDRICKS
A PROFESSIONAL ASSOCIATION

July 17, 1986

Marvin R. Kaplan [1936-1980]
Jarril F. Kaplan
Henry Jacobowitz
Robert F. Byrnes
Paul Rosier
James P. Hendricks
Richard G. Himelrick
M. David Shapiro

1500 Merabank Tower
3003 North Central Avenue
Phoenix, Arizona 85012-2964
[602] 264-3134

6991 East Camelback Road
Suite A-302
Scottsdale, Arizona 85231
[602] 945-0774

Please Reply to Phoenix Office

CERTIFIED – RETURN
RECEIPT REQUESTED

Board of Trustees
Colorado Pipe Industry Pension Fund
1313 Tremont Place
Suite 201
Denver, Colorado 80204

Re: Howard Electric & Mechanical Company

Gentlemen:

On behalf of our client, Howard Electric & Mechanical Company (the "Company"), we are responding to your letter dated May 28, 1986, determining that the Company has withdrawn from the Colorado Pipe Industry Pension Fund (the "Plan") and demanding payment of withdrawal liability in the amount of $555,852.00. The Company does not agree with the Trustees' determination that it has withdrawn from the Plan and that it owes

$555,352.00 in withdrawal liability. Pursuant to Section 4219(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multi-Employer Pension Plan Amendments Act of 1980, the Company requests that the Trustees review their determination that the Company has withdrawn from the Plan effective April 31, 1984, and their calculation of withdrawal liability.

Under Section 4203 of ERISA, an employer will not be deemed to have withdrawn from a plan until it ceases to *have an obligation* to contribute under the plan and continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required.

The Trustees based their determination that the Company has withdrawn from the Plan on an alleged failure to contribute to the Plan since December 31, 1984, and on an alleged impasse in collective bargaining negotiations between the Company and Journeymen Plumbers and Gas Fitters Local Union No. 3 and Pipefitters Local Union No. 208 (the "Unions").

As you know, the Company has been involved in collective bargaining negotiations with the Unions since 1983. The Company has continued to be obligated to make, and indeed has made, contributions to the Plan on behalf of its eligible employees during its negotiations with the Unions; contributions which, we note, the Trustees did not take into account in calculating the Company's withdrawal liability. Notwithstanding the Company's right to suspend contributions to the Plan during

its labor dispute with the Unions, the Company has continued to make contributions to the Plan to December 28, 1984. The Company's *obligation* to contribute to the Plan on behalf of its eligible employees remains unaffected by its collective bargaining negotiations.

Furthermore, the Company does not agree that negotiations are at an impasse; that is solely the position of the Unions. If the Trustees had conducted an independent inquiry into the facts instead of imposing withdrawal liability on the Company on the basis of the Unions' unsubstantiated statement that negotiations were at an impasse, they would have discovered that negotiations are not at an impasse as evidenced by the facts that the Company and the Unions met for negotiations as recently as August 1985, that the Company made an additional offer in writing to the Unions in October 1985, which offer has not yet been responded to by the Unions, and that the Company is willing to meet with the Unions to continue negotiations culminating in a new collective bargaining agreement. The Trustees appear to be acting as agents of the Unions in this case. The Trustees are under a fiduciary obligation to act solely on behalf of Plan participants and their beneficiaries. In accordance with their fiduciary duties, the Trustees are under an obligation to make a reasonable inquiry regarding the facts prior to assessing withdrawal liability on the Company. Failure to do so may constitute a violation of their fiduciary duties under ERISA. See T.I.M.E.-*DC, Inc. v. Trucking Employees Fund*, 560 F.Supp. 294, 303 (E.D. N.Y. 1983).

Under Section 4218(2) of ERISA, an employer is not deemed to have withdrawn from a plan during a labor

dispute involving its employees. The Company is clearly involved in an ongoing labor dispute with its employees. Until that dispute is finally resolved one way or the other, the Company cannot be deemed to have withdrawn from the Plan. As you may know, the Company and the Unions are involved in proceedings before the National Labor Relations Board. In view of the Board's expertise in this area, we suggest that the Trustees defer any determination until the Board acts.

The Company also disagrees with the Trustees' selection of April 30, 1984, as the date of withdrawal and their calculation of its withdrawal liability. The withdrawal date used by the Trustees for purposes of calculating withdrawal liability assumes that the Company withdrew from the Plan on April 30, 1984. That date disregards the fact that the Company engaged in collective bargaining negotiations with the Unions throughout 1985 and continued to contribute to the Plan under the terms of its prior agreement. Even if the Unions were correct that the parties are at an impasse, the earliest date on which the Company could have been deemed to have withdrawn from the Plan would be August 1985. We respectfully request that, if the Trustees intend to impose withdrawal liability on the Company, such liability be calculated as of August 1985, when the Company and Unions last met for negotiations, and not April 30, 1984.

Furthermore, we respectfully demand that any calculation of withdrawal liability include contributions made to the Plan by the Company in 1984. The Company has continued to make, and the Trustees have continued to accept, contributions to the Plan for eligible employees. The Trustees are without authority to disregard those

contributions in calculating withdrawal liability. We also request clarification as to what contributions are included in the figures used by the Trustees. We cannot reconcile the figures used by the Trustees with the Company's contribution records. We request a breakdown of its contributions between the amounts contributed on behalf of members of the Local Union No. 3 and amounts contributed on behalf of the Local Union No. 208 in order to determine the accuracy of those figures.

We respectfully request that you respond to our request for review within a reasonable period as specified in Section 4219(b)(2)(B) of ERISA.

Very truly yours,

/s/ James P. Hendricks
James P. Hendricks

JPH:kk

cc: Jack Howard
R. C. Herdine
Ann Leary
Earl Madsen

Hornbein, MacDonald and Fattor
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1900 Colorado State Bank Building
Denver, Colorado 80202-0419

Philip Hornbein (1962)
Philip Hornbein, Jr.
Donald P. MacDonald
James C. Fattor
Mark E. Brennan
Gerard C. Boyle

Area Code 303
861-7070

Of Counsel
Charles M. Dosh

September 24, 1986

James P. Hendricks, Esq.
Kaplan, Jacobowitz, Byrnes, Rosier and Hendricks
1500 Merabank Tower
3003 North Central Avenue
Phoenix, Arizona 85012-2964

re: Colorado Pipe Industry Pension Fund vs. Howard Electrical and Mechanical, Inc.

Dear Mr. Hendricks:

This letter is the Trustees' response pursuant to Section 4219(b)(2)(B) of ERISA to your request for review of their prior determination of the withdrawal liability of your client Howard Electrical and Mechanical, Inc. The Trustees' investigation discloses the following:

1. Howard has not been a party to any collective bargaining agreement with any local union affiliated with the Colorado Pipe Industry Pension Fund since May 31, 1983.

2. On January 26, 1984, Howard declared bargaining to be at an impasse and on or about August 15, 1984, Howard unilaterally implemented changes in wages, fringe benefits and working conditions which

included the cessation of any payments of pension benefits.

3. Pipefitters Local Union 208 filed a charge with the National Labor Relations Board on or about September 25, 1984, in response to which Howard executed a settlement agreement. Pursuant to the settlement agreement, Howard paid arrearages to the Colorado Pipe Industry Pension Fund for pension contributions through November of 1984, and has paid pension benefits for two of its employees performing covered work through December 31, 1984.

4. On October 10, 1984, the Pipe Industry Pension Fund determined that Howard Mechanical owed the sum of $559,564.00 in withdrawal liability and made a demand therefor. Its demand was withdrawn on account of Howard's settlement agreement.

5. On or about December 31, 1984, Howard terminated the last two union employees it had, and since that date has not employed any active union plumber or pipefitter affiliated with any local union that is a part of the Colorado Pipe Industry Pension Fund.

6. Howard has not made any pension contributions for covered work since December 31, 1984. There have been no negotiations between Pipefitters Local 208 or Plumbers Local 3 and Howard since August 7, 1985, at which time the Unions declared negotiations to be at an impasse.

7. The Company made no demand to bargain until June 24, 1986, four weeks after the Pipe Industry Pension Fund notified Howard Electric of its determination of the withdrawal liability.

8. The National Labor Relations Board has rescinded the settlement agreement and issued a complaint in Case Nos. 27-CA-8889 and 8889-2, which alleged among other things that Howard has failed to bargain in good faith, and has unilaterally altered wages and benefits for employees represented by Local 3. The

> Company has denied that its employees are represented by Local 3 and has denied it has unilaterally altered wages and benefits, notwithstanding its failure to pay any pension benefits since December 31, 1984.

In view of the foregoing, the Trustees affirm their determination of May 26, 1986, that Howard has, in fact, permanently withdrawn from the Pension Plan as of December 31, 1984. For the purposes of determining the amount of that liability, Section 4211 of ERISA requires that unfunded liability be determined as of the end of the plan year preceding the plan year in which the employer withdraws. That plan year ended April 30, 1984, and therefore the amount determined as due is correct.

If you continue to dispute this determination, you have a right to demand arbitration pursuant to Section 4221 of ERISA within sixty (60) days of the date of this letter. The American Arbitration Association has adopted rules for determination such liability pursuant to the Rules of the PBGC.

Even if you choose to arbitrate this, you have an obligation, pursuant to the provisions of Section 4221 of ERISA, to make payments pursuant to the Trustees' determination, and if you fail to make these payments as due, you shall be deemed delinquent. Interest at the statutory rate will be charged with respect to any delinquency. Furthermore, we are instructed to initiate an action to collect any such delinquencies and to seek all other remedies available, including attorney's fees.

Very truly yours

HORNBEIN, MacDONALD, AND FATTOR, P.C.

/s/ James C. Fattor
James C. Fattor

JCF:paf

Copy to: Trustees, Colorado Pipe Industry Pension Plan

> 30-RC-710 dated July 29, 1952, for all journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, pipefitter foremen who are employed by any Employer who is a party to this Agreement or has accepted its provisions.

Prior to the expiration date of the 1981-1983 contract the Charging Parties and Respondent gave timely notice they intended to open the about to expire contract and engage in collective bargaining for a new contract. Respondent also gave timely notice to the Charging Parties it was withdrawing the Association's authority to represent it for purposes of collective bargaining and it intended to negotiate with the Charging Parties on an individual basis.

2. The March 23, 1983-December 29, 1983 negotiations between Respondent and Local 3 and the December 22, 1983-January 6, 1984 negotiations between Respondent and Local 208

Commencing March 23, 1983 negotiators for Respondent and Local 3 met to negotiate a collective bargaining contract to succeed the 1981-1983 contract to cover Respondent's employees represented by Local 3. During 1983 the parties held six collective bargaining sessions: March 23; April 27; May 19; May 31; July 16; and, December 29. During this period Respondent offered a series of proposed contracts which modified the 1981-1983 contract in many significant respects. There was no evidence of Local 3 offering a proposed contract.

As of the July 6, 1983 bargaining session Respondent was proposing a contract effective from the date of its execution to May 31, 1984. Some of its relevant provisions follow.

The "recognition" clause provides for Respondent to recognize Local 3 as the representative "of all full-time and regular part-time employees employed by [Respondent] performing plumbing work in the plumbing industry within the jurisdiction of Local 3." The "hiring of employees" provision gives Local 3 the opportunity to refer all journeymen and apprentice applicants for employment, with Respondent having the right to reject any of the referrals and to hire from other sources if Local 3 failed to fill Respondent's request for applicants after a certain period of time, and further provides that "helpers will not be selected or referred out by Local The wage provision gives Respondent the power to unilaterally increase the employees' minimum hourly rates of pay, and to establish minimum "gross hourly rates" for three classifications: "journeymen," "apprentices," and "helpers." The minimum "gross hourly rates" include Respondent's contributions on behalf of the employees to the several contract benefit funds such as health and welfare, pension, and vacations.[4]

Effective June 1, 1983 the minimum gross hourly rate of pay set for journeymen plumbers by the July 6

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[4] The health and welfare, pension and vacation benefit provisions in the July 6, 1983 contract offer obligate Respondent to deduct from the employees' "gross hourly rate of pay" the amounts agreed to by Local 3 and Respondent for distribution to the several contract employee benefit funds.

proposal was $21.20 and $8.55 for apprentices just starting their apprenticeship.[5] Effective December 31, 1983 the minimum gross hourly rate of pay for journeymen plumbers was $21.70 and $8.72 for apprentices just starting their apprenticeship. Effective June 1, 1983 the minimum gross hourly rate of pay for employees classified as helpers was $5.44. Regarding the helpers, the wage proposal provides that "the ratio of helpers shall be two helpers to each plumber, and there shall be no restriction on the work assignments designated by the Employer."

The aforesaid wage and fringe benefit package for journeymen and apprentices contained in Respondent's July 6, 1983 contract proposal which was effective June 1, 1983, is the same as the wage and benefit package called for under the terms of the 1981-1983 contract when it expired May 31, 1983.[6]

During the July 6, 1983 bargaining session Local 3's negotiators wrote a letter prepared by their attorney which was critical of virtually all of the provisions contained in Respondent's July 6, 1983 contract proposal.[7] It

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[5] Under the terms of the 1981-1983 contract and under the terms of each of the contract proposals involved in this case, apprentices are paid a certain percentage of the contract hourly rate of pay for journeymen, which percentage is increased every 6 months during the apprentices' employment, until they finish their term of apprenticeship.

[6] The 1981-1983 contract, however, did not have a "helper" classification, just "journeymen" and "apprentice" classifications.

[7] The criticism did not extend to the wage and fringe benefit proposals because Local 3 apparently did not submit those parts of the proposal to its attorney for review.

was at the July 6 session that Respondent submitted a new bargaining proposal, the above-described July 6 contract proposal, which in all significant respects was no different from the May 31 contract proposal. The July 6 session ended with the parties agreeing to hold another bargaining session after Local 3 reviewed Respondent's July 6 contract proposal. It was not until December 29, 1983, however, that the next bargaining session was held. It was called by Respondent.

On December 29, 1983, during the bargaining session held that day, Respondent submitted a new contract proposal. Respondent's negotiators characterized this proposal as Respondent's "final offer" and told Local 3's negotiators Respondent "intended to implement its final offer effective January 1, 1984."

The next time the parties communicated with one another concerning contract negotiations was June 19, 1984 when, as described in detail *infra*, Respondent submitted a new contract proposal to Local 3.

Commencing on March 22, 1983 negotiators for Respondent and Local 208 met to negotiate a collective bargaining contract to succeed the 1981-1983 contract to cover Respondent's employees represented by Local 208. During 1983 the parties held 10 collective bargaining sessions: March 22; April 15; April 27; May 19; June 1; June 28; July 20; September 16; November 17 and December 30.

During the first bargaining session held on March 22, 1983, Respondent submitted a proposed collective bargaining contract to succeed the 1981-1983 contract. This proposal contained many provisions which in significant

respects differed from the 1981-1983 contract's provisions. The proposal was effective from date of execution to May 31, 1984. The provisions of the March 22, 1983 contract proposal dealing with recognition, hiring of employees, wages and benefits, in pertinent in part, read as follows.

Respondent proposed in the contract recognition clause to recognize Local 208 as the collective bargaining representative of "all full time and regular part-time employees employed by the Employer performing pipefitting work in the pipefitting industry." The "hiring of employees" provision gave Local 208 the opportunity to refer "all covered employees," with Respondent having the unqualified right to reject any referrals, and the right to hire from other sources if, after a certain period of time, Local 208 did not fill Respondent's request for applicants, and further provides that "apprentices, trainees and helpers will not be selected or referred out by Local 208. The Employer will make selections and these names . . . will be transmitted to Local Union No. 208." The wage provisions of the proposal establish minimum wages for the covered employees, granting Respondent the authority to unilaterally increase those minimum wages and grant incentive increases based upon employees' productivity and performance, and sets out 84 classifications for pipefitters (classifications "16" through "100") whose minimum hourly rates of pay range from $4 (classification "16") to $25 (classification "100"), and further provides Respondent could unilaterally designate which of the 84 classifications the pipefitters would be assigned to. The proposed benefit provision provided for Respondent to deduct from

employees' earnings an amount agreed to by the parties for distribution to the employee contract benefit funds such as health and welfare, pension and vacation.

During the period of negotiations from March 22, 1983 to November 17, 1983 the parties discussed in detail Respondent's March 22, 1983 contract proposal. It was apparently revised by Respondent more than once, in ways not revealed in the record, during this series of negotiation sessions. Local 208 did not counter with a contract proposal of its own and on at least one or two occasions Local 208's membership rejected Respondent's contract proposals. This was the state of the negotiations when the parties met December 30 for the tenth negotiation session.

On December 30, during the negotiation session, Respondent submitted a new contract offer which it characterized as "its last offer." Local 208's negotiators told Respondent's negotiators that the offer would be submitted to the Union's membership.

On January 3, 1984, Local 208 notified Respondent "that the negotiation committee of pipefitters Local Union 208 has not approved or accepted [Respondent's] latest contract proposal but will submit the proposal to [Local 208's] membership for their consideration at a meeting on January 10, 1984." Thereafter, on January 11, 1984 Local 208 notified Respondent that its membership unanimously rejected Respondent's latest contract proposal at a January 10, 1984 special meeting, and that Local 208 was "willing to continue negotiations at your earliest convenience." Respondent replied by telegram dated January 16, 1984, in which it stated:

> Please be informed that the understanding that we reached at the table on December 30, 1983 was our last offer. We are willing to meet with you if you submit to us in writing a proposal that is substantially better than the proposal we agreed upon at the table. Absence (sic) our receiving a new written proposal from you by January 22, 1984 we will implement the understanding reached at the table on January 23, 1984.

On January 20, 1984 Local 208 hand-delivered a contract proposal to Respondent. There were no collective bargaining sessions held between the parties concerning Local 208's proposal. There is no evidence the parties discussed this proposal.

On January 26, 1984, by letter, Respondent informed Local 208 it had reviewed Local 208's January 20, 1984 contract proposal and discovered it did not contain a single concession and that there were numerous changes made in the agreement reached by the parties on December 30, including a significant economic increase.[8] The letter ended:

> In the light of the above, we see no reason to resume negotiations. Since our last offer was rejected by the membership, we are, of course, at impasse and will implement our last offer.

The next time the parties communicated with one another concerning contract negotiations was June 19,

---

[8] There is no evidence of an "understanding" or "agreement" between Local 208 and Respondent during the December 30, 1983 negotiation session as claimed by Respondent in its above-described January 16, 1984 telegram and January 26, 1984 letter.

1984, when, as described in detail *infra*, Respondent submitted a new contract proposal to Local 208.

Respondent's December 29, 1983 contract proposal and Respondent's December 30, 1983 contract proposal.

The duration of Respondent's December 29, 1983 contract proposal for the unit represented by Local 3 and the duration of its December 30, 1983 contract proposal for the unit represented by Local 208 was from the date of their execution until May 31, 1984. Each proposal is identical in all significant respects. The proposals, which for the sake of convenience will be collectively referred to as Respondent's December 1983 contract proposal differ in several significant respects from Respondent's last contract proposals; its March 22, 1983 proposal for the unit represented by Local 208 and its July 6, 1983 proposal for the unit represented by Local 3.

The contract recognition clause in Respondent's previous contract proposals included within the contract bargaining unit all employees who performed plumbing work in the plumbing industry within Local 3's jurisdiction and all employees who perform pipefitting work in the pipefitting industry within Local 208's jurisdiction, whereas the December 1983 contract proposal's recognition clause specifically excludes plumbers and pipefitters classified as "pre-apprentices" from the bargaining unit. Consistent with the exclusion of "pre-apprentices" from the unit in the contract recognition provision, the union security and hiring hall provisions of the December 1983 contract proposal also specifically exclude "pre-apprentices" from their coverage. The December 1983 contract proposal describes the plumbers and pipefitters classified as "pre-apprentices" in these terms:

> Pre-apprentices shall be primarily used for performing work which does not require all the skills of a journeyman. However, pre-apprentices may be assigned to perform work for which they are qualified, under the direction of a journeyman. The ratio of pre-apprentices shall be at the direction of the employer. There shall be no restriction on the work assignments designated by the employer.

The December 1983 contract proposal, unlike respondent's previous contract proposals, divides the employees into two separate categories for purposes of wages and employee benefits; current employees, new hires and recalled employees.

The December 1983 contract proposal's wage and benefit package[9] for the pipefitters and plumbers classified as journeymen and apprentices, who were currently employed, was less than had been provided for under the wage and benefit package in Respondent's March 22, 1983 and July 6, 1983 contract proposals and was less than what was being paid to the Respondent's journeymen and apprentice pipefitters and plumbers under the terms of the 1981-1983 contract.

Regarding new hires or recalled employees classified as journeymen and apprentices, the December 1983 contract proposal provides for the same amount of employee benefit contributions as for current employees employed in those classifications, but provides for an hourly rate of

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[9] As did Respondent's March 22, 1983 and July 6, 1983 contract proposals, the December 1983 contract proposal gave Respondent the right to unilaterally raise the employees' contract minimum hourly rates of pay.

pay of $10 for journeymen, which is substantially less than the rate called for in the 1981-1983 contract for journeymen and at least $6.71 an hour less than the hourly rate called for in Respondent's March 22, 1983 and July 6, 1983 contract proposals for journeymen. Since apprentices are paid a percentage of a journeyman's hourly rate of pay, the hourly rate for newly hired or recalled apprentices in the December 1983 contract proposal was reduced by the same percentage as the journeymen's.

Regarding the new classification of employees designated as "pre-apprentices," the December 1983 contract proposal provides that plumbers and pipefitters employed in this classification be paid a minimum hourly rate of $5 if currently employed and a minimum hourly rate of $4 if they are new hires or recalled workers. It also provides that, unlike the journeymen and apprentices, the pre-apprentices are ineligible to receive the contract fringe benefits, but are eligible to participate in Respondent's profit-sharing and major medical insurance plans.

Lastly, the December 1983 contract proposal contains a "nonseverability" provision which in substance provides that the parties understood that the December 1983 contract proposal is called a package agreement and that no provision is severable . . . that is each provision herein is in consideration for the entire Agreement and to benefit from any provision a party must assume the benefits and obligations of the entire Agreement."

Local 208's January 20, 1984 contract proposal

Local 208's January 20, 1984 contract proposal is effective by its terms from the date of execution until May

31, 1985, rather than May 31, 1984 as provided for by Respondent's December 1983 contract proposal.

The recognition clause in Local 208's proposal includes all employees who performed pipefitting work in the pipefitting industry within the jurisdiction of Local 208.

Respondent's contributions on behalf of the journeymen and apprentices to the several contract benefit funds were the same through May 31, 1984 under Local 208's proposal as under Respondent's proposal, but effective June 1, 1984 Local 208's proposal calls for an increase of $1.50 an hour to be divided among wages and fringes.

Regarding wages, Local 208's proposal does not, as did Respondent's, divide the journeymen and apprentices into presently employed employees and new hires. Local 208 proposed that journeymen and apprentices be paid $1.30 an hour more than Respondent had proposed and also proposed that effective June 1, 1984 they be granted an increase of $1.50 an hour to be broken down between wages and fringes.

In its January 20, 1984 proposal Local 208 also included an agreement dealing with the creation of a new classification of workers, known as "special journeyman." This agreement provided:

> Special journeyman shall be primarily used for performing work which does not require all of the skills of a journeyman. However the special journeyman may be assigned to perform any work for which he is qualified, under the direction of a journeyman.

> The ratio of special journeyman shall be two special journeymen to each journeyman pipefitter; not to exceed 30 percent of the total pipefitters employed by [Respondent].
>
> Special journeyman shall only be employed on those contracts that the total of plumbing, heating, air conditioning and piping contracts does not exceed two and one-half million dollars. . . .

Local 208 proposed that the "special journeyman" be paid an hourly rate of pay ranging from a minimum of $5.03 to a maximum of $10.06. It also proposed that Respondent contribute on their behalf to the contract health insurance fund as they did for the journeymen and apprentices, but would not have to contribute on behalf of the "special journeymen" to the other contract benefit funds. Also, Local 208 proposed that the above agreement concerning the "special journeyman" remain in effect for 6 months from the date of execution and from year-to-year thereafter unless terminated by both parties.

3. The implementation of Respondent's December 29 and December 30, 1983 contract proposals and Respondent's employment of "pre-apprentices."

As I have found *supra*, during the December 29, 1983 negotiations session, Respondent informed Local 3 it "intended to implement its final offer [the December 29 proposal] effective January 1, 1984," and on January 26, 1984 informed Local 208 "We are . . . at impasse and will implement our last offer [the December 30 proposal]." The evidence presented on the issue of whether or not Respondent implemented either of these contract offers, follows.

Respondent did not implement the terms of its December 1983 contract proposal in two respects: the payments made by Respondent on behalf of its journeymen plumbers and pipefitters to the several contract benefit funds were mailed directly to the Pipe Industry Insurance Fund (Fund), whereas the December 1983 contract proposal provided the payments be mailed directly to the offices of Local 3 and Local 208 which would transmit them to the Fund; and, the December 1983 contract proposal omits Respondent's contribution to the Contract Administration Fund, whereas Respondent continued to pay contributions of 12 cents an hour to this fund as agreed upon under the 1981-1983 contract.

In hiring plumbers and pipefitters Respondent did not use the unions' hiring halls. It was not required, however, under the December 1983 contract proposal to give the unions an opportunity to refer these job applicants inasmuch as all of the plumbers and pipefitters hired by Respondent were classified as "pre-apprentices," all of whom were exempt from the hiring hall provisions of the December 1983 contract proposal. Likewise, the "pre-apprentices" were specifically excluded from the December 1983 contract proposal's union security provision, thus Respondent's failure to enforce the union security provision as to those workers was not inconsistent with the terms of the proposal and, in any event, the unions never requested Respondent to enforce the union security provision. Finally, the fact the Respondent continued to permit the journeymen in its employ to take the two 10-minute break periods provided for under the terms of the 1981-1983 contract, does not conflict with the

terms of the Respondent's December 1983 contract proposal inasmuch as there is nothing in that proposal which precluded its employees from taking two 10-minute breaks, in addition to their lunch break.

The sole evidence showing Respondent implemented the December 1983 contract proposal is that pursuant to the terms of that proposal Respondent employed plumbers and pipefitters who were classified as "pre-apprentices." As a matter of fact all of the plumbers and pipefitters hired by Respondent subsequent to January 1, 1984 were classified by Respondent as "pre-apprentices." The first plumber "pre-apprentice" was hired May 17, 1984 and the first pipefitter "pre-apprentice" was hired April 30, 1984. Between May 17, 1984 and October 7, 1985 Respondent hired 41 plumbers all of whom it classified as "pre-apprentices" and between April 30, 1984 and October 25, 1985 hired 24 pipefitters all of whom it classified as "pre-apprentices."[10] Consistent with its December 1983 contract proposal Respondent did not contribute to the contract benefit funds on behalf of the pre-apprentices and did not pay any of them less than the proposed $4 minimum hourly rate of pay for this classification. The

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[10] Following its hire of a plumber "pre-apprentice" on May 17, 1984, Respondent hired three in June 1984, three in July, two in September, two in October, two in November, two in December, three in January 1985, three in February, five in March, three in April, two in June, one in July, eight in August and one in October. Following its hire of a pipefitter pre-apprentice on April 30, 1984, Respondent hired one in May 1984, two in June, one in July, three in August, six in September, two in October, one in December, two in April 1985, one in August 1985, one in September 1985 and three in October 1985.

record reveals that the hourly rates paid to the 41 plumber pre-apprentices range from a minimum of $4 an hour paid to one and a high of $18 an hour paid to one, with the minority at the low end of the scale and the majority towards the middle. Regarding the 24 pre-apprentice pipefitters, their hourly rates of pay range from a minimum of $8 paid to three and a high of $17 paid to one, with the rest of the pre-apprentices being paid between $10 and $15 an hour.

4. The events of June 1984 - August 1984

Following Respondent's communication to Local 3 and Local 208 on December 29, 1983 and January 26, 1984, respectively, stating it intended to implement the December 1983 contract proposal, there was no further communication between the parties until June 20, 1984, when Local 3 and Local 208 received copies of a proposed contract from Respondent with an accompanying letter dated June 19, 1984, stating:

> Please find enclosed a package for your approval, which must be accepted in total, prior to July 1, 1984.
>
> We are prepared to discuss this enclosure with you at your request. This proposal will be implemented in its entirety July 1, 1984.

On June 27, 1984 and July 3, 1984, respectively, Local 3 and Local 208 each wrote Respondent it had reviewed and rejected the June 19, 1984 contract proposal and informed Respondent they wanted to meet with Respondent to discuss the terms of a new contract.

On or about July 1, 1984 Respondent declared an impasse and implemented its June 19, 1984 contract proposal. Local 3 and Respondent did not have any negotiations about Respondent's June 19, 1984 contract proposal prior to its implementation.

No meetings were held between Local 208 and Respondent concerning the June 19, 1984 contract proposal. The parties did not stipulate whether or not Respondent in fact implemented this proposal in the unit represented by Local 208. It is a fair inference, however, that Respondent implemented the proposal in that unit, inasmuch as the parties stipulated that it implemented the proposal in the unit represented by Local 3. Also in its August 15, 1984 letter to Local 208, *infra*, Respondent by telling Local 208, "If you do not accept this change in our implemented proposal [referring to the June 19, 1984 contract proposal]," in effect admitted it had implemented the June 19, 1984 contract proposal in the unit represented by Local 208.

Respondent's June 19, 1984 contract proposals made to Local 3 and Local 208 were identical in substance and will be referred to hereinafter as Respondent's June 1984 contract proposal. It was effective from the date of execution until May 31, 1985. The proposal differs from Respondent's December 1983 contract proposal in a number of significant respects, as follows.

Besides excluding "pre-apprentices," as did the December 1983 contract proposal, the June 1984 contract proposal's recognition provision excludes "apprentices" from the bargaining unit. The "hiring of employees" [hiring hall] provision also excludes "apprentices," as well as

"pre-apprentices, from its coverage and does not obligate Respondent to give the unions an opportunity to refer applicants for employment, but gives Respondent "the right to hire any particular person without going through the hiring hall." The June 1984 contract proposal omits the union security provision contained in the December 1983 contract proposal. The wage provision in the June 1984 contract proposal omits the two-tier system of wage rates for current employees and new hires, contained in the December 1983 contract proposal, and, unlike the December 1983 contract proposal, contains only a single employee classification, that of "journeyman," and proposes that journeymen plumbers and pipefitters receive a minimum hourly rate of pay, including vacation pay, of between "$7.50 and $20."[11] The "Health, Welfare, Vacation and Other Funds" provision in the June 1984 contract proposal eliminates Respondent's contribution to the "Apprentice and Journeymen Training Fund" contained in the December 1983 contract proposal and also, unlike the December 1983 contract proposal, imposes the following condition:

> The Employer shall continue to provide benefits pursuant to the above listed funds, until such time that pursuant to the Internal Revenue Code's anti-discrimination provisions, it becomes necessary to alter the employer's benefit program in order to maintain the qualified

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[11] The December 1983 contract proposal provides that current employed journeymen would receive a minimum hourly rate of pay, including vacation pay, of $16.77 and that new hires would receive $10. Under each proposal Respondent maintained the right to unilaterally increase those minimum wages.

> nature of such programs. In such case, all employees shall be eligible to participate in all employer group benefit plans, such as profit-sharing and major medical, as specified in each plan and the Employer shall then cease making contributions pursuant to the above listed facts.

On July 23, 1984 Local 3 filed its charge in Case 27-CA-8889 alleging Local 3 was a collective bargaining representative of an appropriate unit of all journeymen and apprentice plumbers employed by Respondent and, in violation of Section 8(a)(1) and (5) of the Act, Respondent on or about July 1, 1984 and continuing to date, failed and refused to bargain with Local 3 by unilaterally changing the wage rates, working conditions and terms of employment of the employees in the appropriate unit.

On August 15, 1984 Respondent sent Local 3 and Local 208 a new proposal which changed the benefit fund portion of Respondent's June 1984 contract proposal. More specifically, by identical letters dated August 15, 1984 Respondent notified the unions that with respect to the "Health, Welfare, Vacation and Other Funds" provision of its June 1984 contract proposal, that Respondent was now proposing to add the following language:

> Each employee covered by this agreement shall be given the option to participate in the above Plans [referring to the contract employee benefit plans] subject to the approval of the trustees of the various funds, or to participate in the Company's profit sharing plan and major medical plan subject to the rules for eligibility provided for in said plans.

In this letter Respondent also stated: "If you do not accept this change in our implemented proposal by

August 20, 1984, we will presume that you have rejected the change and we will implement it immediately."

Local 3 and Local 208 responded to Respondent's August 15, 1984 proposal by identical letters dated August 16, 1984 and August 20, 1984, respectively, in which they rejected the proposal and informed Respondent that Respondent's August 15 letter "contains proposals which have never been discussed or negotiated. We are prepared to meet with you to negotiate a new contract."

On August 22, 1984 in case 27-CA-8924 herein and on August 28, 1984 in case 27-CA-8889-2 herein, Local 208 and Local 3 respectively filed identical charges which allege that Local 208 and Local 3 are the collective bargaining representatives of an appropriate unit of all journeymen and apprentices employed by Respondent, and further allege that, in violation of Section 8(a)(5) and (1) of the Act, Respondent, on or about August 15, 1984, failed and refused to bargain with Local 208 and Local 3, "in that [Respondent], without discussion or bargaining with [Local 3/Local 208], has threatened to, and has, unilaterally altered the compensation and terms of employment of bargaining unit employees by revising the provisions of the employee pension, medical insurance, and vacation programs."

On September 25, 1984 Local 208 in case 27-CA-8924 herein filed an amended charge. The amendment added to the initial charge the allegation that commencing on or about February 22, 1984 and continuing to date Respondent had violated Section 8(a)(1) and (5) of the Act by

unilaterally changing the wage rates, working conditions and terms of employment of the unit employees.

5. The October 17, 1984 settlement agreements

On October 17, 1984 the Board's Regional Director for Region 27 approved an informal settlement entered into by Respondent and Local 3 in cases 27-CA-8889 and 27-CA-8889-2 and by Respondent and Local 208 in case 27-CA-8924. The settlement agreement in case 27-CA-8889 and 27-CA-8889-2 provides, in pertinent part, that Respondent would do the following:

> WE WILL NOT fail or refuse to bargain in good faith with Plumbers Local Union No. 3 concerning wages, hours, and other terms and conditions of employment for employees in the following appropriate bargaining unit:
>
> > All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipe fitter foremen, general pipefitter foremen, and pipe fitter foremen who are employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.
>
> WE WILL NOT refuse to bargain in good faith by bargaining to impasse about provisions excluding employees from the appropriate unit described above.
>
> * * *
>
> WE WILL revoke and rescind retroactive to January 23, 1984 all unilateral reductions in pay and benefits affecting our employees in the

> appropriate unit described above and will make whole employees for all losses they sustained as a result of any such change. All other unilateral changes affecting unit employees will be revocable at the request of Plumbers Local Union No. 3.
>
> WE WILL, upon request, bargain in good faith with Plumbers Local Union No. 3 as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.
>
> WE WILL reimburse all employees, retroactive to January 23, 1984, in an amount equal to the difference between the wages and benefits which they would have received if the wage rates, and all other terms and conditions of their employment, had been continued without change, as they existed on January 23, 1984, and we will make remittance to all employee benefit trust funds to which we were obligated to make contributions under terms and conditions of employment as they existed on January 23, 1984, of the full amount of such contributions, less the sum of any contributions which we have made to each respective fund since said date. . . .

The settlement agreement also provided that "Al Farrell and all similarly situated employees, to be made whole by payment to each of them in the amount of backpay and benefits plus interest to be computed by the Regional Director in accordance with existing Board formula." The record reveals that Al Farrell was hired by Respondent as a plumber on June 27, 1984 and was terminated on July 25, 1984, (JT. Exh. 28(j) and Tr. p. 7) and was classified as a "pre-apprentice" and paid $12 an hour and that like all of the other plumbers in Respondent's employ classified

as pre-apprentices, Respondent did not contribute on his behalf into the contract benefit funds.

In entering into the settlement agreement with Local 208 in Case 27-CA-8924 Respondent agreed to abide by provisions which were identical to the above-described provisions in the agreement in Cases 27-CA-8889 and 27-CA-8889-2 between Local 3 and Respondent, with three modifications: (1) the appropriate unit in Local 208's settlement agreement included the classification "provisional apprentices" as being within the appropriate unit; (2) the two paragraphs contained in the Local 3 settlement agreement in which Respondent agrees to revoke and rescind the unilateral reductions in pay and benefits retroactively to January 23, 1984 and to reimburse the employees for their lost wages and benefits retroactively to January 23, 1984, had been changed in the Local 208 settlement agreement to read February 22, 1984 rather than January 23, 1984; and, (3) the Local 208 settlement agreement provides that "[Respondent] will make whole all affected employees by payment to each of them for backpay and benefits plus interest to be computed by the Regional Director in accordance with existing Board formula," and unlike the settlement agreement in the Local 3 case makes no mention of any particular employee or "similarly situated employees."

6. The 1985 negotiations

On February 28, 1985 the Unions and Respondent resumed collective bargaining negotiations and with the agreement of all parties, Respondent bargained jointly

with representatives of Local 3 and Local 208. Subsequently in 1985 five bargaining sessions were held: March 22; July 11; July 17; July 31 and August 7.

During the March 22, 1985 bargaining session the Unions submitted contract proposals for their respective bargaining units. These two proposals were identical in virtually all significant respects and for the sake of convenience are referred to as the Union March 22, 1985 contract proposal.

The Union March 22, 1985 contract proposal is effective from the date of execution until May 31, 1989. Its recognition provision provides for Respondent to recognize Local 3 as the exclusive bargaining agent of all employees employed by Respondent performing plumbing work in the plumbing industry within Local 3's jurisdiction and provides for Respondent to recognize Local 208 as the exclusive bargaining agent of all employees employed by Respondent performing pipefitting work in the pipefitting industry within Local 208's jurisdiction. The proposal also includes a hiring hall provision giving Local 3 and Local 208 the first opportunity to refer job applicants to Respondent.

Regarding wages, the Union March 22, 1985 contract proposal does not include the "special journeymen" classification included in the January 20, 1984 Local 208 contract proposal and does not provide for a change in the existing hourly rates of pay for journeymen or apprentices. It provides, however, that effective November 5, 1986 the minimum hourly rate of pay for journeymen plumbers and pipefitters would be increased to $19.07 and that apprentice plumbers would be paid the hourly

rate set forth in Respondent's December 1983 contract proposal and that the apprentice pipefitters would be paid between $1.70 and $2.16 an hour more than the apprentice plumbers.

The provision in the Union March 22, 1985 contract proposal entitled "Health, Welfare, Vacation and Other Funds," is identical with Respondent's December 1983 contract proposal insofar as the amount of the Respondent's employee benefit contributions are concerned.

During the next bargaining session held July 11, 1985 Respondent submitted to the Unions contract proposals for their respective units. These proposals, although in separate documents, are identical in content and for the sake of convenience are referred to as the Respondent's July 11, 1985 contract proposal. The duration of the July 11, 1985 contract proposal is from the date of its execution until May 31, 1986. In substance it is identical to Respondent's December 1983 contract proposal.

During the next bargaining session on July 17, 1985 Respondent asked the Unions' negotiators to identify the parts of the July 11, 1985 proposal which were "a problem to them" and asked the Unions' negotiators to list the problem items in order of priority and explain to Repondent's [sic] negotiators how they thought these items could be resolved. The Unions' negotiators complied with this request, as follows.

The Unions' negotiators requested an individual wage rate for each employee classification and the same rate of pay for current employees, new hires and recalled former employees, rather than the two-tier wage system proposed by Respondent.

The Unions' negotiators requested that "pre-apprentices," who were excluded from the contract bargaining unit under Respondent's contract proposal, be covered under the contract provisions dealing with "recognition," "union security," "hiring of employees," and "wages and benefits."

The Unions' negotiators objected to Respondent's proposed "working provisions" clause, which obligated employees to make corrections at the minimum wage for work which had to be redone because it did not meet required specifications, and obligated the Unions, if required by an arbitrator, to furnish the required materials to make these corrections and to reimburse Respondent 10 percent for extra overhead costs incurred because the work had to be redone.

The Unions' negotiators objected to the provision in Respondent's contract proposal entitled "Performance Appraisals" which, in substance, provided that wages negotiated in the contract were minimum wages and gave Respondent the right to unilaterally increase employees' wages and to grant employees incentive bonuses based upon productivity and performance.

The Unions' negotiators objected to the portion of Respondent's contractual "no strike-no lockouts" provision which provided that although employees covered by the contract would not be disciplined for refusing to cross an authorized AFL-CIO picket line, the employees would be expected to come to work if furnished a separate gate from the gate used by the picketing union.

The Unions' negotiators objected to the proviso in Respondent's proposed grievance and arbitration proposal which provided, "[t]he grievance and arbitration process in this Agreement shall be the only recourse the employees shall use against his or her Employer.

The negotiators discussed the section of Respondent's contractual hiring hall proposal which dealt with the right of Respondent to call for someone by name.

The negotiators discussed the duration of Respondent's proposed contract.

Regarding the proposed contract provision entitled "Health, Welfare, Vacation and Other Funds" the Unions' negotiators indicated that they wanted a penalty provision included for late employee benefit fund contributions.

The Unions' negotiators asked for certain unspecified changes in the contract management rights clause proposed by Respondent.

Lastly, the parties discussed the provision in Respondent's proposal entitled "Supervision" and the Unions' negotiators agreed that the matters contained therein were not negotiable.

At the next bargaining session held July 31, 1985 the parties discussed the wage rates presently being paid by nonunion contractors in the area and agreed nonunion contractors pay their employees between $10 and $12 an hour. Respondent submitted a revised contract proposal, which by its terms was effective on the date of execution until May 31, 1986. Respondent's negotiators informed

the Unions' negotiators that the revised proposal incorporated some of the changes requested by the Unions' negotiators at the last negotiation session. The Unions' negotiators stated they would review the company's new proposal and submit their contract proposal to Respondent at the next negotiation session.

Respondent's July 31, 1985 proposal differed from its July 11, 1985 proposal in the following respects: The contract "recognition," "union security" and "hiring of employees" provisions included the pre-apprentice classification which had been excluded from these provisions in the July 11 proposal;[12] the part of the contract grievance arbitration procedure proposed by Respondent, stating the grievance arbitration procedure was the only recourse the employee could use against Respondent, was qualified by the proviso, "This does not prevent an employee from filing a charge with the National Labor Relations Board or with the EEO after arbitrator's decision is rendered."; the "no strike-no lockouts" provision, stating employees were expected to come to work if they were furnished a separate gate, was supplemented in the July 31 proposal by the following language, "And the Employer is notified by the owner or owner's representative to man the project or the Employer will be in breach of contract and will be assessed all costs because of this action taken by the employees"; the provision dealing

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[12] The July 31 proposal, however, still gave Respondent the right to assign pre-apprentices to perform any work for which they were qualified and also provided, as did the July 11 proposal, that "the ratio of pre-apprentices shall be at the discretion of the Employer."

with the employees and Unions' obligations when employees' work failed to meet required specifications, was modified by Respondent's July 31 contract proposal but still required the employee to redo the work on his own time; the July 31 proposal omitted the "performance appraisals" provision which in substance gave Respondent the right to unilaterally increase the employees' wages; also in response to the Unions' request the July 31 proposal eliminated from the contract management rights clause the provision giving Respondent the exclusive right "to grant merit increases and incentive bonuses"; the section of Respondent's hiring hall proposal which reads, "If the employer desires to hire any particular person by name," was changed to read, "If the employer desires to hire one particular person by name, per job"; also in response to the Unions' concerns, the July 31 proposal added a penalty clause to the provision dealing with Respondent's obligation to contribute to the employee benefit funds; the July 31 proposal, which still retained the July 11 proposal's two-tier system of wages, proposed that current employees classified as "journeymen" would be paid a minimum hourly wage of $18.10 as contrasted to the hourly rate of $16.77 for this classification in the July 11 proposal; likewise under the July 31 proposal, when compared with the July 11 proposal, current employees classified as "apprentices" received an hourly increase of between 53 cents and $1.14 per hour depending upon the stage of their apprenticeship; the July 31 contract proposal provided for new hires and recalled employees classified as "journeymen" to receive a minimum hourly rate of $12, whereas the July 11 proposal set a minimum hourly rate of $10 for this

classification; likewise, under the July 31 proposal, when compared with the July 11 proposal, new hires and recalled unit employees classified as "apprentices" received an hourly increase of between 70 cents and $1.40 depending upon the stage of their apprenticeship; finally, while employees classified as "pre-apprentices" were not eligible under the July 11 contract proposal to receive benefits under the contract benefit plans, the July 31 proposal provides that pre-apprentices were eligible to receive health and welfare benefits under the contract's health and welfare plan.

At the next negotiation session held August 7, 1985 Respondent asked for the Unions' contract proposal. The Unions' negotiators replied by stating they did not intend to submit a contract proposal and handed Respondent's negotiators identical letters which read as follows:

> Plumbers Local Union No. 3's negotiating committee has reviewed the contract proposal you submitted on July 31, 1985. Your latest contract proposal is less favorable than previous offers in many respects. For example, it contains no provisions for payment of overtime, nothing about work periods, and no schedule of hours.
>
> Furthermore, your proposal fails to address the many items of concern to the Union that have been the subject of negotiations for the past two years. Your proposal still would allow you free reign to assign bargaining unit work to supervisors, including foremen who have been covered by all of our previous agreements with Howard Mechanical. Yet, you would exclude foremen from the recognition and union security clauses while retaining the right to designate foremen in unlimited numbers at your discretion. You also propose to be able to hire

"pre-apprentices" in unlimited numbers and to assign them work without any restriction. Under your proposal, a job could be manned entirely by so-called supervisors and pre-apprentices, and thereby deny any work to journeymen and apprentice members of the Union. And since no Pension contributions would be paid on supervisors or pre-apprentices, your proposal would provide a means for you to evade your obligations to the Pension Fund.

We have repeatedly objected to your various proposals for these reasons, just as you have repeatedly rejected our proposals that address these concerns. For example, you have adamantly (sic) refused to consider our proposal that would allow you to utilize helpers under existing ratios and for certain work.

We have also informed you on several occasions of our objection to your proposal for a one-year contract, the two-tier wage structure (under which all members of the Union would be treated as new or rehired employees at the low wage rate), to your call-by-name proposal, to the no-strike clause, to your proposal that employees must correct allegedly defective work on their own time without pay, and to numerous other regressive proposals. Your latest offer includes all of these previously rejected proposals, or worse.

It has been obvious to us for a long time that you do not truly want to reach agreement with this Local Union. You have repeatedly advanced proposals which would strip your employees of all the rights they have achieved over many years of collective bargaining. Your proposal to pay journeymen, licensed plumbers $12.00 an hour or one-third less than what Union Journeymen presently make is but one example of your total lack of good faith.

> You have gone through the motions of bargaining for over two years since our last agreement expired (sic) in May, 1983. We are no closer today in reaching an agreement than we were when negotiations commenced. We are convinced that this is what you intended all along.
>
> We will not continue to engage in this futile exercise. We reject your latest proposal and we will decline to make any further counter-proposals until and unless you substantiaally [sic] change your position on items which we are presently deadlocked on. As far as we are concerned, the parties are at impasse, and have been for sometime. Accordingly, we intend to advise the Trustees of the Pension Fund of the situation and request them to proceed to collect your withdrawal liability.

Respondent's negotiators denied the negotiations were at an impasse, and pointed out that at the last negotiation session on July 31, 1985 Respondent, as requested by the Unions, submitted a new contract proposal which had revised its previous proposal in several respects. The Respondent's negotiators stated Respondent had been prepared to make additional changes in its contract proposal in an effort to satisfy the Unions' complaints. The Unions' negotiators replied they were not interested in further negotiations and would notify the Trustees of the Pension Fund that negotiations had reached an impasse.

On August 27, 1985 Respondent, by identical letters to the Unions, replied to the Unions' above described August 7 letters, as follows:

> We were shocked to have your letter hand delivered to us at the early stages of our meeting August 7, 1985, because we were prepared to

present a proposal to you that contained a number of concessions as requested by you during our meeting of July 31, 1985.

We were also shocked to read in your letter statements which contradict those you have made in recent bargaining sessions, including some of which amount to your withdrawing previously granted concessions.

We strenuously disagree with your statement in your August 7, 1985 letter that you believe that the parties are at impasse. Rather, it is our position that substantial concessions have been made in recent meetings by both parties and we were prepared during our August meeting to present even more concessions.

Jack Howard is presently out of town and will not be back until September 16, 1985. Based on what we have already indicated to you we were prepared to do during our August 7, 1985 meeting, we accept your "challenge" to sit down and substantially change our position on a number of important items. We would request, therefore, that you contact us so that we may schedule the next couple of meetings to take place after Mr. Howard returns.

In closing, we wish to reiterate it is the company's position that the parties are not at impasse and that further negotiations will be most fruitful. We think it is unfortunate that you took the position expressed in your letter at the beginning of the August 7, 1985 meeting in light of the company being prepared to make some substantial concessions.

On September 10, 1985 the Respondent, by letter, notified the Unions it intended to file unfair labor practice charges if the Unions did not set a date for the resumption of negotiations.

On September 18, 1985 Local 3, and on September 20, 1985, Local 208, wrote identical letters to Respondent in response to its above described August 7 letter. In their response, the Unions, in pertinent part, stated:

> If you do in fact have a new proposal which you would like for us to consider, we suggest that you send it to us at your earliest opportunity. After we have had a chance to review your new proposal, we will contact you about scheduling another meeting. Meanwhile it remains our position that the parties are at impasse for the reasons stated in our letter of August 7.

On August 11, 1985 Respondent submitted to the Unions, by mail, separate but identical contract proposals. Respondent's October 11, 1985 contract proposal differs from its July 31, 1985 contract proposal in these respects: The provision in the July 31, 1985 proposal providing for the correction of work by employees was deleted in its entirety; the language concerning Respondent's late payment penalty for being late in making its contributions to the various contract benefit funds was revised to obligate Respondent to make these payments 5 days earlier, if it wanted to avoid incurring a penalty; the two-tier system of wages which divided employees into current and new or recalled employees was in effect abolished under the October 11, 1985 proposal. In this last respect, the minimum hourly wage rate for currently employed journeymen was reduced from the July 31 proposed hourly rate of $18.10 to $16.80 and the minimum wage rate for new hires or recalled journeymen was increased from the July 31, 1985 rate of $12 to $16.80. Consistent with the above changes the October 11, 1985 proposal proposed that the rates for currently employed

apprentices be reduced and that the rates be increased for newly hired or recalled apprentices, so that both groups would be paid the same minimum hourly rate. Lastly, the minimum hourly rate proposed by the October 11, 1985 proposal for the newly hired or recalled "pre-apprentices" was increased from $4 to $5 which was the rate being proposed for the currently employed "pre-apprentices."

Respondent's October 11, 1985 contract proposal failed to bring the Unions back to the bargaining table and there was no further contact between the parties about negotiations until June 24, 1986 when Respondent wrote the Unions that if they did not contact Respondent for a bargaining session by July 1, 1986 Respondent would file unfair labor practice charges with the National Labor Relations Board alleging they were refusing to bargain in violation of the Act.

Prior to Respondent's June 24, 1986 demand that the Unions resume bargaining, Respondent on or about May 29, 1986 had received a letter from the Fund Administrator of the Board of Trustees of the Colorado Pipe Industry Pension Fund, the fund Respondent had been obligated to contribute to during the term of the 1981-1983 contract on behalf of the unit employees' pension benefits. The letter informed Respondent that since the Fund's records indicated Respondent had not contributed to the Fund since December 31, 1984 and since the Fund had been advised that negotiations for a new contract between Respondent and the Unions had reached "impasse," the Fund's trustees concluded Respondent had "withdrawn from the Plan" and, accordingly, was subject "to the withdrawal liability provisions of the Multi-Employer

Pension Plan Amendments Act of 1980, a Federal enactment amending the Employee Retirement Income Security Act of 1974 (ERISA)." The Fund Administrator advised Respondent its withdrawal liability totalled $555,852.00 and demanded payment.

On July 17, 1986 Respondent wrote the Fund contesting its conclusion Respondent had withdrawn from the Plan and specifically challenged the assertion that negotiations between Respondent and the Unions were at an impasse.

On July 17, 1986 in Cases 27-CB-2373 and 27-CB-2374 Respondent filed charges against the Unions alleging that, in violation of Section 8(b)(3) of the Act, since about July 1, 1986 the Unions had failed and refused to meet and confer with Respondent in good faith at reasonable times and places. As of the date of the hearing in this case – January 21, 1987 – the Board's Regional Director for Region 27 had not made a determination on the merits of these charges.

On November 5, 1986 Respondent wrote the Unions separate but identical letters informing them that Respondent accepted their March 22, 1985 contract proposal in its entirety.

In November 1986, shortly after receiving Respondent's November 5, 1986 letter, the Unions wrote separate but identical letters to Respondent stating that their March 22, 1985 bargaining proposal was no longer open for acceptance due to the lapse of time and changed circumstances. The Unions informed Respondent they were treating Respondent's letter of November 5, 1986 as an adoption by Respondent of the Unions' March 22, 1985

contract proposal, which Respondent was now proposing for the Unions' acceptance. In order to properly evaluate the proposal, the Unions asked Respondent to furnish them certain information.

On November 26, 1986 Respondent renewed its demand to the Unions that they accept and execute the agreement embodied in their March 22, 1985 contract proposal. On December 2, 1986 the Unions reiterated their refusal to do this.

On December 8, 1986 Respondent filed charges against the Unions in Cases 27-CB-2425 and 27-CB-2425-2 alleging that since on or about December 2, 1986 the Unions had violated Section 8(b)(3) of the Act by refusing to meet with Respondent in good faith and by refusing to execute a collective bargaining agreement agreed to by the parties. As of the date of the hearing in this case the Regional Director for Region 27 had not made a determination on the merits of these charges.

B. *Discussion and Conclusions*

1. The settlement agreements

On July 23, 1984 in case 27-CA-8889 Local 3 filed a charge alleging in substance Respondent violated Section 8(a)(5) and (1) of the Act on or about July 1, 1984 by unilaterally changing the wage rates, working conditions and terms of employment of the employees represented by Local 3. On August 22, 1985 in case 27-CA-8924 Local 208 filed a charge and on August 28, 1984 Local 3 filed an identical charge in case 27-CA-8889-2 alleging that on or about August 15, 1984 Respondent violated Section

8(a)(5) and (1) of the Act by threatening to change and by unilaterally changing the provisions of the pension, medical insurance and vacation programs of the employees represented by the Unions. Lastly, on September 25, 1984, Local 208 filed an amendment to its charge in case 27-CA-8924 which alleged that commencing on or about February 22, 1984 and continuing to date Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wage rates, working conditions and terms of employment of the employees represented by Local 208.

On October 17, 1984 the Board's Regional Director for Region 27 approved the settlement agreements entered into by and between the Unions, Respondent, and counsel for the General Counsel in the aforesaid cases.

The appropriate bargaining unit described in each of the settlement agreements includes within the unit the classifications of journeyman and apprentice plumbers and pipefitters, however, the unit description in the agreement covering the employees represented by Local 208 also includes the classification "provisional apprentices" as being within the unit.

In the settlement agreement covering the unit represented by Local 3, Respondent promises to "revoke and rescind retroactive to January 23, 1984" all unilateral reductions in pay and benefits affecting the unit employees and to reimburse the employees "retroactive to January 23, 1984" the difference between the wages and benefits they would have received if the wages and benefits had been continued "as they existed on January 23, 1984," and promises to make the employees' benefit

trust fund contributions which it was obligated to make on January 23, 1984. Also Respondent promises, upon request, to bargain in good faith with Local 3 as the exclusive representative of all the employees in the appropriate unit.

The language set forth in the settlement agreement covering the unit represented by Local 208 contains the identical language except that whenever the date "January 23, 1984" appears in the Local 3 agreement, it reads "February 22, 1984" in the Local 208 agreement.

January 23, 1984 is the start of the 10(b) limitations period for the charges filed by Local 3 in Cases 27-CA-8889 and 27-CA-8889-2. The start of the 10(b) limitations period for the charge filed by Local 208 in Case 27-CA-8924 is February 22, 1984.

No evidence was presented about the negotiations between the parties which led up to and resulted in the settlement agreements. Nevertheless, Respondent contends, "[t]here was an oral understanding that the agreements would be interpreted in accordance with Respondent's position." Respondent, in support of this contention, relies upon its attorney's letter of February 28, 1985 sent to the Regional Director in Cases 27-CA-8889 and 27-CA-8889-2. This letter was sent several months after the settlement agreements were executed, when the Regional Director was investigating the Unions' claim that the agreements had not been complied with. In this letter Respondent's attorney informed the Regional Director: "As you know, the agreement for purposes of remedy goes back to January 23, 1984. It was made very clear in the discussions between myself and the Region

prior to executing the settlement agreement that as to remedy the company's offer [referring to the December 1983 contract offer], which was put in effect in January prior to the 23rd, did not have to be disturbed."

Respondent's contention is without merit because (1) no evidence was presented that in fact Respondent's attorney before executing the settlement agreement had reached an understanding with the representatives of the Regional Director or the General Counsel or the Unions, or even informed them, it was his understanding that the terms of the settlement agreements would not disturb Respondent's December 1983 contract proposal which had been implemented; and, (2) the Regional Director in response to Respondent's attorney's February 28, 1985 letter wrote the attorney denying that the attorney had ever communicated such an understanding to the Region prior to his February 28, 1985 letter. The fact the Regional Director failed to answer the February 28, 1985 letter from Respondent's attorney for several months and the lapse of time between the execution of the settlement agreements and the start of the Regional Director's investigation into whether or not Respondent had complied with the agreements, is insufficint [sic] to establish Respondent's claimed oral understanding.

Subsequent to the execution on October 17, 1984 of the settlement agreements, Respondent continued to classify each plumber and pipefitter it hired as a "pre-apprentice" and to unilaterally establish their hourly rates of pay, and did not contribute on their behalf to the employee benefit funds established by the 1981-1983 contract.

In or about the fall of 1985 a representative of the Board's Regional Director advised Respondent's lawyer it appeared Respondent had not complied with the terms of the settlement agreements because it was continuing to classify the plumbers and pipefitters it was hiring as "pre-apprentices" and was in effect excluding them from the collective bargaining unit with respect to their wages and other employment benefits. Respondent's lawyer took the position that in continuing to hire plumbers and pipefitters and classifying them as "pre-apprentices," Respondent was acting consistent with the terms of the settlement agreements. He explained that Respondent's December 1983 contract proposal gave it the right to classify all of its pipefitters and plumbers as pre-apprentices and to exclude them from the coverage of the proposal's fringe benefit provisions, and to unilaterally set their rates of pay, as long as they were paid at least $4 an hour. Therefore, Respondent's lawyer explained, since the terms of the December 1983 contract proposal had been implemented in January 1984, prior to either January 23, 1984 or February 22, 1984, there was nothing for Respondent to rescind or revoke. In short, Respondent's lawyer took the position that when Respondent, pursuant to the settlement agreements, agreed to restore the status quo to January 23, 1984 in the case of the Local 3 bargaining unit and to February 22, 1984 in the case of the Local 208 bargaining unit, it had merely agreed to abide by the terms and conditions contained in Respondent's December 1983 contract proposal. The representative of the Regional Director responded by informing Respondent's lawyer that the Regional Director had approved the settlement agreements with the understanding Respondent's

December 1983 contract proposal had not been implemented and that the only proposal of Respondent which had been implemented was the one it had implemented July 1, 1984, and that under the terms of the settlement agreements the status quo envisioned by the Regional Director consisted of the terms and conditions of employment set by the 1981-1983 contract, not the Respondent's December 1983 contract proposal.

In the instant proceeding the General Counsel contends the Regional Director was justified in setting aside the settlement agreements for two reasons: (1) Respondent failed to comply with the terms of the settlement agreements by continuing to classify its plumbers and pipefitters as pre-apprentices and treating them as non-unit workers whose wages and benefits were established unilaterally by Respondent; and (2) by proposing in July 1985 that it be granted the right to retain unilateral control over all aspects of the pre-apprentices' terms and conditions of employment, Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) of the Act, which also violated the terms of the settlement agreements.

I have serious doubts whether the General Counsel's second alleged justification for the Regional Director's decision to vacate the settlement agreements is encompassed within the scope of the pleadings. Assuming it is, it is without merit. The fact that in July 1985 Respondent proposed that the Unions accept a contract which would grant Respondent the right to hire pre-apprentices in unlimited number and to assign them to do bargaining unit work without any restriction, does not warrant the inference Respondent was not bargaining in good faith

with a sincere desire to reach a collective bargaining agreement. Nor is there other evidence which, when coupled with Respondent's proposal concerning the pre-apprentices, would warrant the inference Respondent in July 1985 was not bargaining in good faith with a sincere desire to reach an agreement.

Insofar as the General Counsel is contending that in July 1985 Respondent in its bargaining with the Unions insisted to impasse upon a nonmandatory subject – the exclusion of plumbers and pipefitters classified as pre-apprentices from the units – there is no evidence to support this contention. In Respondent's July 31, 1985 contract proposal which was made immediately after the Unions expressed their opposition to Respondent about Respondent's proposal to exclude pre-apprentice plumbers and pipefitters from the units, Respondent specifically included the pre-apprentices within the coverage of the contract recognition, union security and hiring hall provisions and dropped its proposal which would have given it unilateral control over the pre-apprentices' wages, and agreed that the pre-apprentices would be covered by the contract's health insurance provision. The fact that Respondent was still proposing that pre-apprentices not be covered by the contract's pension plan and that Respondent be given the right to hire an unlimited number of pre-apprentices and to assign them to do plumbers and pipefitters work without restriction does not establish Respondent was making a contract offer which in effect excluded the pre-apprentices from being represented by the Unions.

Regarding General Counsel's contention that Respondent violated the terms of the settlement agreements by

continuing to hire plumbers and pipefitters whom it classified and treated as pre-apprentices, I am of the opinion there was no meeting of the minds by the parties insofar as the settlement agreements affected Respondent's right to employ plumbers and pipefitters and classify them as pre-apprentices.

In its December 1983 contract proposal Respondent proposed it be given the right to hire an unlimited number of pre-apprentices who would be excluded from the contract's recognition, union security and hiring hall provisions, and to assign them to do unit work without restriction and to pay them whatever wage rates it desired so long as it paid them a minimum wage of $4 an hour. On December 29, 1983 Respondent told Local 3 it intended to implement the December 1983 contract proposal in the Local 3 unit effective January 1, 1984, and on January 26, 1984 told Local 208 it intended to implement the December 1983 contract proposal in the Local 208 unit because the parties were at an impasse. Subsequently, in April and May 1984, the first time Respondent's manpower requirements necessitated the employment of additional plumbers or pipefitters, Respondent hired plumbers and pipefitters and classified all of them as pre-apprentices and unilaterally set their rates of pay and excluded them from the coverage of the expired contract's fringe benefit provisions. The October 17, 1984 settlement agreements obligated Respondent to restore the status quo to things as they existed on January 23, 1984 in the Local 3 bargaining unit and to things as they existed on February 22, 1984 in the Local 208 bargaining unit. The above-described circumstances persuade me

that when Respondent read the above-described language of the settlement agreements it could have reasonably believed they meant Respondent was obligated to live up to the terms of its December 1983 contract proposal insofar as the employment of pre-apprentices was concerned.

On the other hand it was perfectly reasonable for the Unions and the General Counsel to believe that by executing the settlement agreements Respondent had agreed to restore the status quo as it existed before January 1, 1984 when the 1981-1983 contract governed the terms and conditions of employment of employees represented by the Unions. Thus the dates of January 23, 1984 and February 22, 1984 are not tied timewise to the start of any of the unilateral acts of conduct involved in this case. Rather these dates are specifically tied to the 6 months limitation period set forth in Section 10(b) of the Act. The reason for this is because the Board's normal remedy for violations of the kind of unilateral conduct alleged in the Unions' charges is limited to the 10(b) period. See, *Al Bryant, Inc. et al.*, 260 NLRB 128, fn. 3 (1982). Under the circumstances I am persuaded it was not unreasonable for the Unions and the General Counsel to believe that the intent of the settlement agreements was to restore the status quo to the terms and conditions of employment which were in place prior to Respondent's implementation of the December 1983 contract proposal and to believe that the reason January 23, 1984 and February 22, 1984 were used in the settlement agreements, as the dates on which the status quo was to be restored, was that as a matter of law it was necessary to confine the agreements' make-whole remedy to periods commencing on those dates.

Also in assessing the intent of the parties when they entered into the settlement agreement in Cases 27-CA-8889 and 27-CA-8889-2 it is significant that included in this settlement is a provision which provides that Respondent shall make whole Al Farrell, who was hired by Respondent as a pre-apprentice plumber on June 27, 1984, and all of the other plumber pre-apprentices similarly situated, for their loss of wages and fringe benefits caused by Respondent's alleged unfair labor practices. The settlement agreement makes sense only if the intent of the agreement was to make Farrell and the other similarly situated pre-apprentices whole for the loss of their wages and fringe benefits incurred as a result of Respondent's implementation of its December 1983 contract proposal. For, the make whole provision could not have been referring to either Respondent's alleged July 1, 1984 or August 15, 1984 unilateral changes in the employees' wages and conditions inasmuch as these changes did not in any way adversely affect the pre-apprentices' terms and conditions of employment.[13] Previously, when it implemented the December 1983 contract proposal, Respondent had instituted the provisions dealing with the pre-apprentices, which provisions were not changed in any way by the Respondent's subsequent proposals of June 19, 1984 or August 15, 1984.

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[13] It would have been very easy for the parties to have made the make whole provision dealing with Farrell and the other "similarly situated" pre-apprentices retroactive to July 1, 1984 if the intent of the settlement agreements had been to simply restore the status quo as of the period of time immediately prior to the implementation of Respondent's June 19, 1984 and August 15, 1984 contract proposals.

Based upon the foregoing I am of the opinion that assuming Respondent's interpretation of the settlement agreements was a reasonable one, and accurately reflects what was in its mind at the time of the settlements, that the Unions and the General Counsel had markedly different ideas as to what the settlements were intended to cover and that their interpretation was a reasonable one. In other words, there was no meeting of the minds when the settlement agreements were executed. It is for this reason that I find the Regional Director properly set aside the settlement agreements in these cases.

Respondent asserts that principles of contract construction preclude me from considering General Counsel's and the Unions' interpretation of the settlement agreements. This argument is without merit. First, even under the technical principals of contract law an examination of the parties' different understandings of the settlement agreements warrants the conclusion that there was no meeting of the minds. See, *Corbin on Contracts*, Sec. 104 (1963) (" . . . If the parties had materially different meanings [of the language], and neither one knew or had reason to know the meaning of the other, there is no contract."); *Williston on Contracts*, Sec. 1541 (1957); *Apache Powder Co.*, 223 NLRB 191, 195 (1976). Respondent's construction of the settlement agreements ignores a significant number of the relevant circumstances, including the legal circumstances involving the limitations proviso to Section 10(b) of the Act, which demonstrate that the Unions and General Counsel could reasonably understand that the dates contained in the settlement agreements were merely remedial cut-off dates required by the statute's 10(b) limitations period and were not meant to

legitimatize the implementation of the contract pre-apprentice provisions proposed by Respondent.

In any event, paraphrasing the Fourth Circuit's language, "general contract principles alone [do not] govern this issue." *George Banta Company, Inc. v. NLRB*, 604 F.2d 830, 835 (C.A. 4, 1979). The "disposition of unfair labor practice charges [pursuant to settlement] involves not simply an adjustment of the rights of private parties, but also a broader public interest," and it is the "ultimate responsibility of the agency . . . to insure that the public interest is served by a settlement." *Id.* at 836. In this regard, the Board, with Supreme Court approval, has a long standing policy of setting aside settlement agreements in order to insure that the policies of the Act are not frustrated by an ineffectual agreement. *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944). Whenever a settlement fails to achieve its purpose – i.e., to end labor disputes, extinguish their causative elements and restore labor peace (*Wallace Corp. v. NLRB*, 323 at 254) – the Board will set it aside. E.g., *International Photographers of the Motion Pictures Industries*, 197 NLRB 1187 (1972), enfd. 477 F.2d 450 (C.A. D.C. 1973). In determining whether the settlement has accomplished its objective the Board does not rely on "a mechanical application of a rigid a priori rule," but instead utilizes "the existence of sound judgment based upon all of the circumstances of each case." *Ohio Calcium Company*, 34 NLRB 917, 935 (1941). Where a settlement, under the circumstances, effectuates the purposes of the Act, it will not be set aside, but where "subsequent events have demonstrated that efforts and adjustments have failed to accomplish their purpose . . . there is no estoppel

to further Board proceedings." *Wallace Corp. v. NLRB*, 323 U.S. 248, 254-255 (1944).

In the instant case, the purposes of the Act are plainly served by the Regional Director's withdrawal of approval from the settlement agreements, since the settlements proved insufficient to lay to rest the rights and obligation of the parties and left their labor dispute unresolved. See *International Photographers of the Motion Pictures Industries*, 197 NLRB 1187 (1972), enfd. 477 F.2d 450 (C.A. D.C. 1973) where the Board affirmed the Regional Director's withdrawal of approval from an informal settlement agreement, concluding that "this was a case where no agreement was reached" and that "it would be inequitable to hold the parties to the commitments contained in the settlement." In *International Photographers* approval was withdrawn from the agreement even though there was no ambiguity in the language of the agreement itself; rather, the deficiency in the agreement was that each party reasonably made widely divergent assumptions about the implementation of its terms. See also, *City Cab Company of Orlando v. NLRB*, 122 LRRM 2392, 2396-2397 (C.A. 11, April 28, 1986).

2. The December 1983 contract proposal

During the negotiations covering Local 3's unit, Respondent submitted a new contract proposal to Local 3 on December 29, 1983, which it characterized as its "final offer," and told Local 3 it intended to implement this offer effective January 1, 1984.

During the negotiations covering Local 208's unit, Respondent submitted a new contract proposal to Local 208 on December 30, 1983, which it characterized as "its last offer," and subsequently on January 26, 1984, after Local 208 rejected the December 30 contract offer and Respondent had rejected Local 208's counteroffer, Respondent informed Local 208 that negotiations had reached an impasse and Respondent intended to implement its last contract proposal.

One of the provisions included in Respondent's December 1983 contract proposal,[14] excluded all plumbers and pipefitters classified as "pre-apprentices" from the proposed contract's recognition, union security, hiring hall and benefit provisions and gave Respondent the right to hire pre-apprentices in unlimited numbers and to assign them bargaining unit work without restriction and the right to unilaterally set their rates of pay as long as they were paid at least $4 an hour.

In 1984 it was not until April 30 that Respondent hired its first plumber or pipefitter, and when it hired that plumber it classified him as a pre-apprentice and thereafter during 1984 and 1985 whenever Respondent employed plumbers or pipefitters it classified them as pre-apprentices and consistent with the December 1983 contract proposal treated them as nonunit employees.

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[14] As noted *supra*, for the sake of convenience the above-described December 29, 1983 and December 30, 1983 contract proposals are referred to collectively as Respondent's December 1983 contract proposal.

On July 23, 1984 Local 3 filed its initial charge in this case and on August 22, 1984 Local 208 filed its initial charge. Thus, the 6-months limitations period prescribed by Section 10(b) of the Act commenced in Local 3's bargaining unit January 23, 1984 and in Local 208's bargaining unit February 22, 1984.

The complaint in this case alleges that on or about December 29, 1983, in the unit represented by Local 3, and on or about December 30, 1983, in the unit represented by Local 208, Respondent demanded, as a condition of consummating any collective bargaining agreement, that the Unions agree to a provision that altered the existing appropriate bargaining units by excluding from the units plumbers and pipefitters classified as "pre-apprentices," and that in furtherance and in support of this demand Respondent, on those dates, "bargained to an unprivileged and invalid impasse" (complaint, paragraphs 9(a), (b), (d) and (e)). The complaint further alleges Respondent violated Section 8(a)(5) and (1) of the Act when, on or about January 23, 1984 in the Local 3 unit, and on or about February 22, 1984, in the Local 208 unit, "at a time when no good faith impasse existed," Respondent unilaterally altered the wages and benefits of the units' employees including the employees classified as "pre-apprentices" (complaint, paragraphs 12(d) and 13(d)).

In its post-hearing brief in support of the complaint allegations counsel for the General Counsel argues at page 9:

> *Any impasse the Respondent (d)eclared in December over the pre-apprentice(s) . . . was invalid. Therefore, Respondent could not implement the changes in the*

> *bargaining unit. The Respondent violated Section 8(a)(5) when it implemented the unit changes following an invalid impasse.* [Emphasis added.]

And further argues at page 10 of her brief:

> (T)he Respondent announced to the Plumbers on December 29, its intent to implement its final offer effective January 1, 1984. The Respondent announced to the Pipefitters on January 20 that its final offer would be implemented. *Since it was an invalid impasse, the Respondent could not implement its final offer.* The Plumbers and Pipefitters hired by the Respondent following the invalid implementation, as well as employees already employed by Respondent in December, were lawfully part of the existing bargaining unit. By classifying these employees as nonunit pre-apprentices, assigning them unit work, and failing to apply to them unit wage rates and terms of employment, the Respondent unilaterally change(d) the scope of the unit and violated Section 8(a)(5). [Emphasis added.]

In its post-hearing brief in support of the complaint's allegations, counsel for the Charging Parties asserts that, "the first issue to be decided on the merits of the case itself is whether or not the Company bargaining [sic] to an unprivileged and invalid impasse."

Respondent takes the position that the complaint's allegations which pertain to the implementation of the pre-apprentice provisions contained in its December 1983 contract proposal should be dismissed because they are time barred by the 6-month limitations proviso to Section 10(b) of the Act. Respondent's 10(b) defense is meritorious.

A decision on how to apply Section 10(b) to the facts of this case must be made in the light of the statute's underlying policy. The Supreme Court has described the policy of the statutory time limit as "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question had become dim and confused' " and "of course to stabilize existing bargaining relationships." *Local Lodge No. 1424, International Association of Machinists v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 419 (1960) quoting H. R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947). In *Bryan* the court interpreted Section 10(b) of the Act as precluding the filing of an unfair labor practice charge which was grounded on events pre-dating the limitations period. There the court distinguished between two situations:

> The first is one where occurrences within the 6-months limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. [Footnote omitted.] The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time barred, to permit the event itself to be so used in effect results in

reviving a legally defunct unfair labor practice. 362 U.S. at 416-417.

In *Bryan* the situation fell within the second category, "for the entire foundation of the unfair labor practice charged was the union's time barred lack of majority status when the original collective bargaining agreement was signed." 362 U.S. at 417.

In the instant case the charged misconduct which occurred within the 10(b) period – Respondent's exclusion from the units of employees performing unit work by classifying them as "pre-apprentices" – is alleged to be an unfair labor practice relying solely upon Respondent's earlier alleged illegal conduct which pre-dated the start of the 10(b) period; its insistence as a condition precedent to entering into a collective bargaining agreement with the Unions, that the Unions agree to permit Respondent to exclude employees from the unit doing unit work by classifying them as "pre-apprentices." This is the theory of the complaint, as set out specifically in the complaint and in the General Counsel's and Charging Parties' briefs, and is the way the case in fact was litigated. In other words, not only do all of the operative facts essential to establishing the unfair labor practices charged in this case take place outside of the 10(b) period, but the counsel for the General Counsel, as alleged in the complaint, must prove that this pre-10(b) conduct constituted an unfair labor practice in order to prove, as alleged in the complaint, that Respondent's conduct within the 10(b) period violated the Act. Thus, the entire foundation for the alleged unfair labor practices is another alleged unfair labor practice which is admittedly time barred by the Section 10(b) limitations period. *Bryan* does not allow

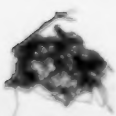
this. It is for these reasons that I am persuaded the complaint's allegations that Respondent refused to bargain within the meaning of Section 8(a)(5) of the Act by unilaterally altering the wages and benefits of the units' employees commencing on January 23, 1984 and February 22, 1984, the start of the respective 10(b) periods, are barred by the 6-month limitations proviso to Section 10(b) of the Act. *The Catholic Medical Center of Brooklyn and Queens*, 236 NLRB 497, 500-501 (1978); *Durfee's Television Cable Company*, 174 NLRB 611, 613-614 (1969). I therefore shall recommend the dismissal of these allegations in their entirety.

Harvard Folding Box Company, 273 NLRB 841, 845-847 (1984), cited by the Charging Parties, is inapposite because, unlike the instant case, it was not litigated based upon the theory that the alleged unfair labor practice was inextricably tied to another unfair labor practice which occurred outside of the 10(b) period. Also in *Harvard Folding Box*, the Board concluded that the start of the 10(b) period was tolled because the employer's announcement of its unilateral change in vacation pay policy was made to the employees and not the union, which did not learn about the new policy for several months. Here, as I have found *infra*, the Unions' knowledge of the disputed unilateral changes pre-dated the start of the 10(b) limitations period. Finally, insofar as *Harvard Folding Box* holds that the employer's announcement of the unilateral change in its vacation pay policy would have been insufficient to start the 10(b) period, even if it had been made to the union, it relied in substantial part upon *California School of Professional Psychology*, 227 NLRB 1657 (1977) which was specifically overruled

by the Board in *United States Postal Service Marina Mail Processing Center*, 271 NLRB 397 (1984).

I also reject the Charging Parties' contention it was not until Respondent began to hire employees to perform unit work and classified them as "pre-apprentices" that the Unions first learned of this policy, thereby tolling the start of the 10(b) limitations period. As I have found *supra*, the Unions were told by Respondent, outside of the start of the 10(b) period, it was implementing the December 1983 contract proposal which excluded all employees performing bargaining unit work whom Respondent chose to classify as "pre-apprentices" from the contract's recognition, union security, hiring hall and benefit provisions and gave Respondent the right to hire pre-apprentices in unlimited numbers and to assign them to bargaining unit work without any restriction and the right to unilaterally set their rates of pay as long as they were paid $4 an hour. This notification clearly placed the Unions on sufficient notice of the alleged unfair labor practices to file a charge. *Postal Service Marina*, 271 NLRB 397 (1984); *Carter-Glogau Laboratories*, 280 NLRB No. 49 (June 19, 1986).

The fact Respondent did not have an occasion for approximately 4 months to utilize its new policy of classifying employees performing unit work as "pre-apprentices," does not detract from the fact that the Unions were clearly and unequivocably [sic] advised, prior to the start of the 10(b) period, that Respondent was implementing its December 1983 contract offer which contained this new policy. As I have found *supra*, in 1984, it was not until April and May that Respondent hired its first unit employees at which time, and at all times thereafter



whenever it hired unit employees, Respondent classified them and treated them as "pre-apprentices." Under these circumstances, Respondent's failure to utilize its new policy concerning the "pre-apprentices" prior to April-May 1984 could not have reasonably led the Unions to believe Respondent did not intend to implement that portion of its December 1983 contract proposal.

I also reject the Charging Parties' contention that by failing to implement certain provisions of its December 1983 contract proposal, Respondent "lulled the unions into believing Respondent continued to abide by the expired contract rather than implement the December 1983 proposals, as threatened." In this regard, as I have found *supra*, there is evidence Respondent did not implement the terms of its 1983 contract proposal in only two respects: mailing contract benefit payment contributions to the Fund, whereas the December 1983 contract proposal provided the payments be mailed to the Unions which would transmit them to the Fund;[15] and, continuing to pay contributions to the Contract Administration Fund as it had agreed to do under the terms of the 1981-1983 contract, whereas the December 1983 contract offer omitted this contribution.

No one from the Unions testified that because Respondent continued to pay benefit contributions directly to the Fund and continued to contribute to the Contract Administration Fund, that this led the Unions to

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[15] The 1981-1983 contract is silent on this subject.

believe Respondent had changed its mind about implementing the terms of the December 1983 contract proposal, including the pre-apprentice provisions, and instead was continuing to abide by the terms and conditions of the expired 1981-1983 contract. Nor does Respondent's failure to implement the December 1983 contract proposal in these two respects, on its face warrant the inference it led the Unions to believe this. Thus, there is no evidence it was ever brought to the Unions' attention, during the time material herein, that Respondent was still contributing to the Contract Administration Fund. And mailing the benefit fund contributions directly to the Fund instead of indirectly to the Fund through the Unions, was not the kind of conduct which would have reasonably led the Unions to believe Respondent was continuing to abide by the terms of the expired 1981-1983 contract rather than implementing its December 1983 contract proposal.

3. The June 19, 1984 contract proposal

On June 19, 1984, when negotiations resumed after a hiatus of several months, Respondent made another contract proposal to the Unions. It was identical to Respondent's last proposal of December 1983 insofar as it excluded "pre-apprentices" from the contract bargaining unit. In addition to pre-apprentices, it also excluded "apprentices" from the contract unit, even though they had been specifically included within the unit encompassed by the 1981-1983 contract.

The Respondent sent its June 19, 1984 contract proposal to the Unions by mail at which time it wrote the

Unions it was prepared to discuss the proposal at the Unions' request, but that the proposal "must be accepted in total, prior to July 1, 1984" and that it "will be implemented in its entirety July 1, 1984."

On July 27, 1984 and July 3, 1984 Local 3 and Local 208 wrote Respondent rejecting the June 19, 1984 contract proposal and advised Respondent they wanted to meet with it to discuss the terms of a new contract.

No meetings were held between the parties concerning the June 19, 1984 contract proposal which was implemented July 1, 1984.

General Counsel contends that the changes in the employees' wages and benefits instituted as a result of Respondent's July 1, 1984 implementation of its June 19, 1984 contract proposal constitute unlawful unilateral changes in the employees' existing terms and conditions of employment because the proposal's exclusion from the bargaining units of the pre-apprentices and apprentices was a nonmandatory subject of bargaining which Respondent insisted upon as a condition precedent to entering into an agreement with the Unions, thereby constituting a refusal to bargain in good faith which precluded a genuine impasse on any of the terms set forth in the June 19, 1984 proposal. Alternatively, General Counsel appears to argue that Respondent's July 1, 1984 unilateral changes in the employees' wages and benefits was unlawful because Respondent has not shown that these new wages and benefits, which were a part of its June 19, 1984 contract proposal were implemented after an impasse in bargaining.

It is settled that to insist to impasse on nonmandatory subjects of bargaining is an unfair labor practice in violation of Section 8(a)(5). *NLRB v. Borg-Warner*, 356 U.S. 342, 349 (1958). In explaining what constitutes impasse bargaining by an employer in the context of proposing a nonmandatory subject, the Board has indicated that before it will conclude an impasse has occurred, the union must have placed the employer on notice that it objects to the alleged nonmandatory bargaining proposal so that the employer will be afforded an opportunity to withdraw this proposal from his overall contract proposal. Thus, in *Union Carbide Corporation*, 165 NLRB 254, 255 (1967) the Board stated:

> It is well settled, however, that [the statutory] obligation to bargain does not mean that bargaining must be confined to the statutory subjects (case). Either party may lawfully propose nonmandatory bargaining items. Neither party may insist, however, nor condition its bargaining or the execution of any agreement, upon acceptance of such demand by the other party (case). The Respondent, therefore, did not violate its duty to bargain when, on June 2, it initially proposed certain modifications in the current pension-insurance agreement. Nor was it unlawful insistence for Respondent to refer to its June 2 "package" offer during two subsequent bargaining sessions when the union's wage and vacation demands were discussed. For, the union had not expressly and unequivocally rejected that offer or the nonmandatory bargaining demand contained therein. After Respondent presented its "final offer" on June 29, the union negotiators for the first time declared their opposition to Respondent's injection of the nonmandatory issue into the basic contract negotiations. In these circumstances,

> however, it can hardly be said that Respondent's insertion of the nonmandatory subject in its "final offer" of June 29 constituted unlawful insistence in the face of a clear and express refusal by the union to bargain about the pension insurance modifications (case).

Similarly, the Board in *National Fresh Fruit & Vegetable Company*, 227 NLRB 2014, 2016 (1977) stated:

> . . . The controlling factors in determining whether a party insisted unlawfully upon a subject in the course of bargaining are (1) whether the demand was on a mandatory or voluntary subject of bargaining and (2) whether the insisting party persisted in demanding the nonmandatory provision in the face of continuing rejection by the other party. . . .

In the instant case there is no evidence that prior to Respondent's June 19, 1984 contract proposal or in response to that proposal that the Unions told Respondent they were opposed to Respondent's interjection of the alleged nonmandatory issues contained therein into the contract negotiations. The Unions' approach, insofar as this stipulated record shows, was simply to reject Respondent's December 1983 and June 19, 1984 contract proposals in their totality without specifying which provisions it objected to or the basis for their objections; the Unions did not specifically object to the inclusion of the alleged nonmandatory bargaining items in Respondent's proposals. There is no evidence that the Unions had reason to believe that such an objection would have been futile. Quite the opposite, after the negotiations resumed in July 1985, when the Unions for the first time expressed their objection to Respondent's proposal excluding preapprentices from the units, Respondent immediately

withdrew this proposal from its contract offer.[16] Under the circumstances, the lack of evidence that Respondent insisted on the alleged nonmandatory provisons [sic] in the face of the Unions' objection to those provisions, I am persuaded the General Counsel has failed to prove that when Respondent on July 1, 1984 implemented the wage and benefit provisons [sic] of its June 19, 1984 contract proposal that it did so in the context of having insisted upon the alleged nonmandatory subjects as a condition precedent to entering into any agreement with the Unions.[17] Cf. *Bozzuto's Inc.*, 277 NLRB No. 100 (Dec. 6 1985) (Employer bargained to impasse over a nonmandatory subject – the alteration of the bargaining unit – where the union "made clear [to the employer] that it would not change the unit and would not recommend to its members a package containing such a change.")

I am also persuaded that when on July 1, 1984 Respondent changed the employees' wages and benefits pursuant to the terms of its June 19, 1984 contract

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[16] Upon the resumption of negotiations in July 1985, Respondent had previously withdrawn the contract provision excluding "apprentices."

[17] "[I]n evaluating whether the parties have insisted to impasse on a particular nonmandatory subject of bargaining, the Board and courts have looked to whether agreement on the mandatory subjects of bargaining are conditioned on agreement on the nomandatory [sic] subjects of bargaining (cases)" *Taft Broadcasting Company*, 274 NLRB 260, 261 (1985). See also, *Latrove Steel Company v. NLRB*, 105 LRRM 2393, 2398 (C.A. 3. August 19, 1980) ("What *Borg-Warner* prohibits is insistence upon a nonmandatory subject as a condition precedent to entering an agreement").

proposal that the record shows the parties had bargained to an impasse.[18]

The last time the parties communicated with one another about the bargaining negotiations prior to Respondent's June 19, 1984 contract proposal was December 29, 1983 in the Local 3 unit and January 26, 1984 in the Local 208 unit. On those dates, as described in detail above, the negotiations were deadlocked without any realistic possibility that continuation of the negotiations would be fruitful. This is vividly demonstrated by the fact that for the next four and one-half months, until Respondent transmitted its June 19, 1984 contract proposal, there was no bargaining sessions and there is no evidence that any of the parties made an effort to schedule further contract negotiation meetings. Respondent's June 19, 1984 contract proposal, clearly was not calculated to break the impasse in the negotiations. Its provisions were substantially worse insofar as the Unions were concerned, thus leaving the parties even further apart.[19] These circumstances have persuaded me that when

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[18] An impasse in collective bargaining negotiations exists when "good faith negotiations have exhausted the prospects of concluding an agreement" or when "there [is] no realistic possibility that continuation of discussions . . . would be fruitful." *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624, 628 (C.A. D.C. 1968).

[19] The June 19, 1984 contract proposal omitted the union security and the exclusive union hiring hall provisions, and for the first time excluded the apprentices from the unit, and lowered the hourly wage rate for journeymen, and subjected the continuation of Respondent's benefit contributions to a new condition.

Respondent implemented its June 19, 1984 contract proposal that negotiations between the parties were still at an impasse.[20]

Based upon the foregoing, I find that when Respondent unilaterally changed the employees' wages and benefits on July 1, 1984 by implementing its June 19, 1984 contract proposal, that it did so after it had bargained with the Unions to a valid impasse. I therefore shall recommend the allegations pertaining to this conduct be dismissed in their entirety.

4. The August 15, 1984 contract proposal

As set forth in detail *supra*, on August 15, 1984 Respondent sent the Unions a new proposal modifying its June 19, 1984 contract proposal in one respect; it gave the employees covered by the contract an option to participate in either the contract benefit plans or the Respondent's profit-sharing and major medical plans. Respondent wrote the Unions on August 15, 1984 that if they did not accept this change in Respondent's proposal

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[20] Whether Respondent's course of conduct, including the nature of its bargaining proposals and the fact that it only offered the Unions 11 days to consider its June 19, 1984 contract proposal before implementing it, warrants the inference Respondent was bargaining in bad faith without a sincere desire to reach an agreement, was not alleged in the complaint as a violation of the Act. In entering into the stipulation of facts in this case the parties did not litigate this issue. Accordingly, insofar as General Counsel appears to be arguing Respondent was engaged in overall bad faith bargaining so as to preclude the existence of a valid impasse, I have not considered this argument.

by August 20, 1984, "we will presume that you have rejected the change and we will implement it immediately." By letters dated August 16, 1984 and August 20, 1984 the Unions notified Respondent they rejected this proposal. The record, the stipulation of facts, does not say whether Respondent implemented its August 15, 1984 proposal.

General Counsel contends Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the employees' benefits of employment when or about August 20, 1984 it implemented its August 15, 1984 benefit proposal without affording the Unions an opportunity to bargain about the matter. General Counsel's contention is without merit because there is insufficient evidence to establish that Respondent in fact implemented this proposal. I therefore shall recommend the complaint be dismissed insofar as it encompasses this allegation.

5. The Respondent's July 1985 bargaining conduct

Lastly, with respect to the General Counsel's contention that in July 1985 Respondent engaged in bad faith bargaining in violation of Section 8(a)(5) of the Act by proposing in negotiations that it be given the right to retain unilateral control over all aspects of the preapprentices' terms and conditions of employment, I am of the view that this contention is without merit for the reasons set forth earlier in the section of the Decision dealing with the setting aside by the Regional Director of the parties' settlement agreements.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

The complaint is dismissed in its entirety.

Dated: 8 April 1987

/s/ Jerrold H. Shapiro
Jerrold H. Shapiro
Administrative Law Judge

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[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,	)	
Plaintiff-Appellant,	)	
and	)	
TRUSTEES OF COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust; et al.,	)	
Plaintiffs,	)	
v.	)	88-2938
HOWARD ELECTRICAL & MECHANICAL IND., a Colorado Corporation; et al.	)	
Defendants-Appellees	)	
and	)	
JACORE, INC., a Colorado corporation,	)	
Defendant.	)	

ORDER

Filed August 27, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK,

BRORBY, EBEL, Circuit Judges, and SEAY, District Judge.*

The court grants appellant's motion for an extension of time to respond to appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration of appellees' petition and appellant's response, the panel judges deny rehearing.

In accordance with Fed R. App. P. 35(b), the clerk transmitted appellees' suggestion for rehearing en banc, together with appellant's response, to the judges of the court in regular active service. Since no member of the panel or judge in regular active service requested a vote, rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

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*Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,	)	
Plaintiff-Appellant,	)	
vs.	)	Court of Appeals
HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, and HOWARD SYSTEMS, INC., a Colorado corporation,	)	Docket No. 88-2938
Defendants-Appellees.	)	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

(Received June 15, 1990)

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June 15, 1990

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,	)	
Plaintiff-Appellant,	)	
vs.	)	Court of Appeals Docket No. 88-2938
HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, and HOWARD SYSTEMS, INC., a Colorado corporation,	)	
Defendants-Appellees.	)	

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decisions of the United States Supreme Court and of the United States Court of Appeals for the Tenth Circuit, and consideration of the full court is necessary to secure and maintain uniformity of decisions in this Court:

Laborer's Health and Welfare Fund for N. Ca. v. Advanced Lightweight Concrete Co., 484 U.S. 539, 108 S. Ct. 830, 98 L. Ed. 2d 936 (1988)

Trustees of Ironworker's Fund v. A & P Steel, 812 F.2d 1518 (10th Cir. 1987)

Communication Workers of America v. U.S. West Direct, 847 F.2d 1475 (10th Cir. 1988)

Hicks v. The Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987)

Bruno v. Western Electric Co., 829 F.2d 957, 966 (10th Cir. 1987)

Bath v. Nat'l Ass'n of Intercollegiate Athletics, 843 F.2d 1315 (10th Cir. 1988)

DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 172, 103 S. Ct. 2281, 2294, 76 L. Ed. 2d 476, 494 (1983)

Park County Resource Council, Inc. v. United States Dept. of Agriculture, 817 F.2d 609, 619 (10th Cir. 1987)

I express a belief based upon a reasoned and studied professional judgment that this appeal involves questions of exceptional importance concerning the doctrine of federal agency (NLRB) primary jurisdiction in the context of national labor policy and the interrelations with another federal act (MPPAA), 29 U.S.C. §§ 1381-1462, and the question whether the Panel lacked jurisdiction to grant summary judgment for the Appellant and when material issues of fact remain for resolution by the district court.

By /s/ Earl K. Madsen
Earl K. Madsen
Attorney of record for
Appellees
Howard Electrical &
Mechanical,
Inc. and Howard Systems, Inc.

* * *

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust, Plaintiff-Appellant, vs. HOWARD ELECTRICAL & MECHANICAL, INC., a Colorado corporation, and HOWARD SYSTEMS, INC., a Colorado corporation, Defendants-Appellees.	Court of Appeals Docket No. 88-2938

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Appellees Howard Electrical & Mechanical, Inc. and Howard Systems, Inc. ("Howard"), submit this Petition for Rehearing and Suggestion for Rehearing In Banc pursuant to F.R.A.P. 35, 40, and Tenth Circuit Rules 35 and 40.

REASON FOR GRANTING REHEARING BY PANEL

The Panel committed manifest error and exceeded the scope of its appellate jurisdiction in ordering entry of summary judgment for the Appellant rather than remanding this action for exercise of district court jurisdiction. Important issues exist for remand, including equitable tolling of the arbitration period, which have never been considered by the district court.

REASON FOR GRANTING REHEARING IN BANC

The Panel's opinion, which rejects the long established principle of primary jurisdiction of the NLRB and holds that arbitration of a withdrawal liability claim is necessary even when the identical claim is already pending in NLRB proceedings, reverses *sub silentio*, Tenth Circuit decisions and squarely contradicts Supreme Court authority.

I. STATEMENT OF THE CASE

The district court found that where previously initiated NLRB proceedings[1] over Howard's alleged unlawful implementation of a bargaining proposal had invoked that agency's jurisdiction to resolve the issue which was at the very heart of the Trustees' claim,[2] the court was without subject matter jurisdiction to proceed. The NLRB

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[1] The NLRB charge nos. 27-CA-8924, 8889, 8889-2, alleged that Howard unilaterally implemented, without bargaining, an August 1984 collective bargaining proposal to take its employees out of the Trustees' funds and instead placed them in Howard's own company benefit plans. The NLRB's jurisdiction over this refusal to bargain charge, NLRA – 29 U.S.C. § 158(a)(5), is clear and the NLRB had jurisdiction and power to require Howard to make post-labor contract expiration contributions to the Trustees' funds and to disestablish its plan for such unit employees. *See Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir. 1981).

[2] In Amended Complaint paragraphs 9, 16, and 17, the Trustees alleged that Howard "unilaterally terminated" its obligation to the Funds by "implementing" the August 1984 bargaining proposal which constituted "a withdrawal from" the Trustees' funds.

proceedings controlled and would be dispositive of the Trustees' claim, and the district court was required to defer to the primary jurisdiction of the NLRB. The court granted Howard's Motion for Summary Judgment on the jurisdictional issue and did not rule on the Trustees' Motion for Summary Judgment on liability issues. The district court did not reach the merits of any claim or defense other than Howard's jurisdictional challenge.

The Panel reversed and ordered entry of summary judgment for the Appellant Trustees. This decision has resulted in a windfall of some $550,000 to the Trustees, since the NLRB has entered its decision holding that the bargaining proposal of Howard was not implemented. Therefore, the claimed statutory withdrawal, based entirely on the same alleged implementation, simply did not occur. Nevertheless, the Panel concluded that Howard was required to invoke MPPAA[3] arbitration to resolve its claims and to proceed simultaneously with the previously invoked NLRB proceedings, as well as MPPAA arbitration on that issue. The Panel ruled that since Howard erroneously relied upon the primary jurisdiction of the board to resolve the issue and did not also invoke MPPAA arbitration, Howard waived its rights to defend the Trustees' withdrawal claims.

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[3] MPPAA refers to the Multi-employer Pension Plan Amendment Act of 1980, 29 U.S.C. §§ 1381-1462.

II. ARGUMENT

A. THE PANEL COMMITTED MANIFEST ERROR AND EXCEEDED THE SCOPE OF ITS APPELLATE JURISDICTION IN ORDERING ENTRY OF JUDGMENT FOR THE TRUSTEES RATHER THAN REMANDING THIS ACTION FOR EXERCISE OF DISTRICT COURT JURISDICTION.

Even if it is assumed that the Panel's decision is correct, and that Howard should have demanded arbitration even though the alleged triggering fact creating "withdrawal" was already squarely joined in NLRB proceedings, the proper disposition of this appeal is to remand this action for further proceedings and exercise of jurisdiction by the district court.

1. The Panel Exceeded the Scope of its Appellate Jurisdiction.

The appellate jurisdiction of this Court is limited to reviewing matters actually resolved by a final decision of the district court. *See Golden Villa Spa, Inc. v. Health Indus. Inc., et al.*, 549 F.2d 1363, 1364 (10th Cir. 1977); *Medical Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345 (10th Cir. 1973). Here, there is no final order on the Trustees' motion on liability, and no notice of appeal concerning same. Further, as to matters which have not been resolved in the first instance by the district court, the proper appellate disposition is to remand for further proceedings. *See Hicks v. The Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987); *Bruno v. Western Electric Co.*, 829 F.2d 957, 966 (10th Cir. 1987); *Bath v. Nat'l Ass'n of Intercollegiate Athletics*, 843 F.2d 1315 (10th Cir. 1988) (because alternative grounds for dismissal with prejudice

were not considered in first instance by the district court, appropriate disposition, upon reversal, was remand for district court to make any such determination).

In this case, the district court dismissed the action for lack of subject matter jurisdiction and did not even address, much less resolve, issues such as Howard's defenses of equitable tolling of the arbitration period, whether exceptions to the doctrine of exhaustion of administrative remedies apply, what *res judicata* effect if any should be given to the NLRB proceedings, and other matters, including defenses arising subsequent to the MPPAA arbitration period.[4] Whether Howard is foreclosed from asserting defenses which would have been available to it had it invoked arbitration is one matter.

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[4] Such defenses include matters already presented in the court proceedings below, and noted in the record on appeal before this court: further fund contributions by Howard (ROA 7, p. 4); further tendered fund contributions by Howard (ROA 3, exs. 2, 3); Howard's acceptance of union's bargaining proposals, November 1986 (ROA 3, ex. 1, p. 22); new collective bargaining agreement entered into between Howard and unions dated July 2, 1988, continuing Howard's duty thereafter to contribute to the Funds (ROA 9, ex. A). This evidence illustrates some of the potential defenses that Howard did not yet have at the time the MPPAA duty to request or initiate arbitration expired, and relate to several sections of MPPAA, including 29 U.S.C. § 1385 (partial withdrawal); § 1386 (Adjustment for Partial Withdrawal); § 1387 (Reduction or Waiver of Complete Withdrawal Liability); or § 1388 (Reduction of Partial Withdrawal Liability) among other provisions potentially affected. Since these defenses did not yet exist during the arbitration period, they could not have been waived by any failure to demand arbitration.

Directing entry of summary judgment to preclude Howard from raising in the district court other material issues which have never been resolved is quite another matter. Such issues have never been addressed and certainly are not before this Court at this stage in the proceedings.

2. The Panel's Remand for Entry of Judgment for the Trustees Divests Howard of its Right to Argue That the Arbitration Period Should be Equitably Tolled.

a. When Equitable Tolling Has Not Been Considered by the District Court the Proper Appellate Mandate is to Remand.

If, *arguendo*, the Panel is correct in its conclusion that a MPPAA arbitrator had jurisdiction to determine the Trustees' withdrawal liability claim notwithstanding pending NLRB proceedings, then the issue becomes ripe as to whether that arbitration period should be equitably tolled given the unique procedural and substantive facts of this case. The Supreme Court has held that when an appellate court determines that a statute of limitations applies, but the district court never considered whether the limitations period should be equitably tolled, the appellate remedy is to remand the action to the district court for consideration of equitable tolling:

> Petitioner DelCostello contends, however, that certain events operated to toll the running of the statute of limitations until about three months before he filed suit. Since the District Court applied a 30-day limitations period, it expressly declined to consider any tolling issue. 524 F. Supp. at 725. Hence, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

See DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 172, 103 S. Ct. 2281, 2294, 76 L. Ed. 2d 476, 494 (1983). The same result has been reached by the Third Circuit. *See Martin v. Pullman Standard*, 726 F.2d 101, 102 (3rd Cir. 1984) (proper appellate mandate, when district court has not considered issue of equitable tolling of limitations period, is to remand for such consideration). Given the Panel's opinion holding that arbitration was proper, the question of whether the arbitration period should be equitably tolled, allowing the parties to now proceed to arbitration, becomes pertinent for the first time. The required appellate mandate is to remand.

b. Equitable Tolling is a Doctrine Which is Universally Accepted in the Context of MPPAA.

Equitable tolling of the arbitration period is a doctrine which is universally accepted in the context of MPPAA. For example, in *Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 875 F.2d 1285 (7th Cir. 1989) an employer assessed with withdrawal liability failed to demand MPPAA arbitration and instead filed a declaratory action in district court, the proper forum for such litigation in the employer's view, arguing that it was not an "employer" subject to the arbitrator's jurisdiction. The federal forum eventually held that the "employer" issue is itself subject to arbitration and that the employer should have demanded arbitration. The Seventh Circuit upheld the district court's determination, however, that the arbitration period should be equitably tolled:

> [T]he issues presented question the arbitrator's authority to bind the parties. When the question

> is whether one of the parties falls within the arbitrator's jurisdiction, fairness considerations mandate that the deadline for arbitration be tolled until determination is made that the party is subject to mandatory arbitration. The district court recognized that this Banner issue had not been definitively decided previously.

Id. at 1291-91. Equitable tolling of the arbitration period in the context of MPPAA has also been applied in a number of other decisions and is a well recognized judicial vehicle to prevent draconian results.[5] In this case, Howard's argument in support of tolling of the arbitration period is as compelling, if not more so, than the

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[5] *See Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 644 (4th Cir. 1983) (MPPAA arbitration period equitably tolled when constitutionality of statute and jurisdiction of arbitrator were challenged); *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Worker's Union (Indep.) Pension fund v. Central Trans., Inc.*, 888 F.2d 1161 (7th Cir. 1989) (Trustees' filing of claim in bankruptcy equitably tolled the period in which to demand arbitration of withdrawal liability); *The Flying Tiger Line, Inc. v. Central States, S.W. and S.E. Areas Pension Fund*, 659 F. Supp. 13, 18-19 (D. Me. 1986) (MPPAA arbitration period equitably tolled where company argued it was not an "employer" in federal court), *aff'd* 830 F.2d 1241 (3rd Cir. 1987); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987) (equitable tolling applied to MPPAA arbitration requirement); *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Worker's Union (Indep.) Pension Fund v. Chicago Kansas City Freight Line, Inc.*, 694 F. Supp. 469 (N.D. Ill. 1988) (MPPAA arbitration period equitably tolled even though employer did not file declaratory judgment action in federal court); *Robbins v. Pepsi-Cola Metro, Bottling Co.*, 636 F. Supp. 641, 679 n. 53 (N.D. Ill. 1986) (challenge to constitutionality of MPPAA in federal court did not result in waiver of right to invoke MPPAA arbitration).

arguments which have been accepted by numerous other courts.

3. The Panel's Remand for Entry of Judgment for the Trustees Divests Howard of its Right to Argue That the Exceptions to the Doctrine of Exhaustion of Administrative Remedies are Applicable.

The Panel's opinion represents the first judicial pronouncement in this case that the administrative remedy of arbitration should have been exhausted by Howard. As the Panel opinion correctly states, the doctrine of exhaustion of administrative remedies is not a jurisdictional requirement and is subject to a number of exceptions. The district court has not had the opportunity to resolve in the first instance whether any of the exceptions apply.

Until this Panel's decision, the Tenth Circuit has repeatedly refused to inflexibly require exhaustion of administrative remedies. *See Park County Resource Council, Inc. v. United States Dept. of Agriculture*, 817 F.2d 609, 619 (10th Cir. 1987); *Jette v. Bergland*, 579 F.2d 59, 62 (10th Cir. 1978). Instead, this Circuit has proclaimed, consistent with other circuits, that the doctrine of exhaustion "has some flexibility depending on the circumstances" and that "to apply it to a specific case requires an understanding of the purpose of the doctrine and of the administrative structure" at issue. *See Jette, supra*, 579 F.2d at 62.

Exhaustion in this case would not have fulfilled any of the purposes behind the exhaustion doctrine, in general, or the administrative structure of the MPPAA, in particular. The Panel correctly notes that the MPPAA was

designed for "informal and expeditious" resolution of disputes over withdrawal liability. See Panel Opinion at 16. However, there was nothing "informal and expeditious" about proceedings before the NLRB which were determinative of this dispute over withdrawal liability. As the Panel observed, the arbitrator would have been "obligated to accord collateral estoppel effect" to the NLRB determinations. See Panel Opinion at 17. To require arbitration, only to have the arbitrator sit and wait several years for the NLRB's findings on the determinative issue is a far cry from the "informal and expeditious" resolution contemplated by Congress.

For the same reason, exhaustion would not have furthered "development of a factual record." *See Park County, supra,* 817 F.2d at 619. The determinative factual record was developed in proceedings before the NLRB. Bound by the Board's findings, an arbitrator would have been left without any record to develop.

Exhaustion would not have promoted deference to an arbitrator's expertise.[6] *Id.* To the contrary, an arbitrator would have been required to defer to the expertise of the NLRB, which had before it the very issue on which withdrawal liability turned. Nor would exhaustion have

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[6] This Court recently held in *Centennial State Carpenter's Pension Trust Fund v. Centric Corp.*, No. 89-1081 (April 23, 1990) (Slip Op., p. 9), that MPPAA generally requires arbitration of disputes only "concerning" and "assessment" of withdrawal liability. MPPAA determinations are those involving the "merits of the liability assessment itself." The issue whether Howard implemented the August 1984 proposal is clearly not such a technical assessment issue within the special competence of a MPPAA arbitrator.

avoided "premature interruption of the administrative process." *Id.* The arbitral process would have been interrupted anyway, to wait for the NLRB's resolution of the determinative issues.

Where, as here, the purposes behind exhaustion "would not be promoted by application of the exhaustion doctrine, it is error to indiscriminately dismiss in its name". *See Park County, supra,* 817 F.2d at 619. *See also New Mexico Ass'n for Retarded Citizens v. New Mexico,* 678 F.2d 847, 850 (10th Cir. 1982) ("exhaustion principle is not indiscriminately applied"). Yet that is precisely what the Panel did.

The question is whether the Panel's opinion impermissibly removed this issue from ever being considered by the district court. If reversal was appropriate and if the Panel did not intend to change this Circuit's law on exhaustion of administrative remedies, a remand without and indiscriminate ruling on the issue is in order. If, however, the Panel intended to write "flexibility" out of the law of this Circuit and treat MPPAA exhaustion differently from the way this Circuit has treated exhaustion in other contexts, then Howard suggests that in banc consideration of this issue is appropriate.

In sum, for all of the above reasons, the proper mandate, even assuming the propriety of the Panel's opinion, is to remand this action to the district court for exercise of its jurisdiction and consideration of all such unresolved issues.

B. THE PANEL'S OPINION, WHICH HOLDS THAT ARBITRATION OF WITHDRAWAL LIABILITY IS NECESSARY EVEN WHEN THE ISSUE IS PENDING BEFORE THE NLRB, IS CONTRARY TO DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT AND REJECTS THE LONG-ESTABLISHED PRINCIPLE OF PRIMARY JURISDICTION OF THE NLRB.

The Court should grant rehearing or seek rehearing *in banc* because the Panel's decision effectively reverses, without citation, long-established law of this Circuit relating to the "primary jurisdiction" of the NLRB to adjudicate cases significantly involving the statute administered by that agency, and because rather than seeking an accommodation between two federal statutes, the Panel has subordinated the NLRA to the MPPAA with "draconian" results.

Panels of this Court have long held that district courts have jurisdiction to resolve National Labor Relations Act issues which may arise in varied contexts, so long as those ancillary issues are not the subject of proceedings before the National Labor Relations Board. When there is an NLRB proceeding pending, this Court adheres to long-standing principles of deferral to the NLRB's "primary jurisdiction." Thus in *Trustees v. A & P Steel, Inc.*, 812 F.2d 1518 (10th Cir. 1987), Judge Anderson, writing for Judges McKay and Baldock, considered the positions of conflicting circuits on the issue of NLRB primary jurisdiction. That panel found the position of the Fifth Circuit, as set forth in *Carpenter's Local U. No. 1846 v. Pratte-Farnsworth*, 690 F.2d 489 (5th Cir. 1982) more compatible with jurisdictional considerations. Having surveyed the law, the court read the much discussed *S.*

Prairie Const. Co. v. Operating Engineers, 425 U.S. 800 (1976) (*per curiam*), as turning on "the fact that the NLRB had already assumed initial jurisdiction in the dispute, yet had not made a ruling" on the NLRA issue arising in a § 301 context.[7] *Trustees v. A & P*, 812 F.2d at 1525.

With *S. Prairie* and *Pratte-Farnsworth* as guides, the court recognized that a district court may assume ancillary jurisdiction over labor act matters "at least where the same . . . question is not pending before the NLRB or where the NLRB's jurisdiction has not been invoked with respect to the dispute between the parties." 812 F.2d at 1527.[8]

Again, in *CWA v. U.S. West Direct*, 847 F.2d 1475 (10th Cir. 1988), another § 301 case raising NLRA issues, Judge Timbers, writing for Judges Baldock and Anderson, reemphasized that crucial to *A & P* and *S. Prairie* was whether the NLRB had already assumed jurisdiction of the issue. Referring to *A & P*, the court said:

> We concluded that *S. Prairie* need not apply . . . provided there is no prior or pending invocation of NLRB jurisdiction. 847 F.2d 1475, 1479 n. 1.

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[7] Section 301 of the NLRA confers jurisdiction upon federal district courts to resolve breach of labor contract issues. *A & P Steel, supra*, 812 F.2d at 1526.

[8] There is no conceptual distinction between district court consideration of an NLRA representational issue where there is no pending board proceeding, as in *A & P*, and consideration of unfair labor practices under the NLRA. They each fall within the broad primary jurisdiction rule.

Here, there is no question but that the jurisdiction of the NLRB had been invoked prior to the jurisdiction of the district court, and prior to the MPPAA arbitration period, for the purpose of resolving the identical issue of the termination of an NLRA obligation to continue pension contributions after contract expiration, through implementation of the alleged Howard bargaining proposal.

The NLRB has determined the issue in Howard's favor, a conclusion this Panel finds would have been binding on the arbitrator. The question, however, is whether the arbitrator, like the Court below, was bound by principles of primary jurisdiction through the prior invocation of Board process. Under *A & P, U.S. West Direct*, and their progenitor, *Pratt-Farnsworth*, the applicability of primary jurisdiction is clear.

The position of this Court's earlier Panels is perfectly consistent with the position of the Supreme Court in *Laborer's Health & Welfare Fund for N. Ca. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S.Ct. 830, 98 L. Ed. 2d 936 (1988). In that case, the Supreme Court discussed the accommodation that Congress and the courts require in the complex interrelations between NLRA and MPPAA.[9] The court noted that "withdrawal liability"

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[9] The Supreme Court's rule of tribunal deference to the exclusive primary jurisdiction of the NLRB is of long standing: *Myers v. Bethlehem Shipbuilding Corp. Ltd.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L.Ed. 638, 644 (1938) (jurisdiction of NLRB under Act is exclusive and must be exhausted before any other judicial relief may be sought); *Garner v. Teamsters Union*, 346 U.S. 485, 490-91, 74 S. Ct. 161, 98 L. Ed. 228, 239-40 (1953) (Congress established a rule for "any tribunal competent to apply law

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after labor contract expiration is derived solely from an "obligation imposed by the NLRA," citing 29 U.S.C.

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generally to the party." That rule precludes determinations in "labor controversies" by a "multiplicity of tribunals" and confides primary jurisdiction for same to the NLRB); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775, 783 (1959) (state and federal courts "must defer" to the exclusive primary jurisdiction, the "exclusive competence," of the NLRB when "an activity is arguably subject to § 7 or § 8 of the Act [Unfair Labor Practice section 8(a)(5), as here] if the "danger" of interference with national labor policy is to be averted); *Int'l Longshoremen's Assn. v. Davis*, 476 U.S. 380, 391, 106 S. Ct. 1904, 90 L. Ed. 2d 389, 401, (1986) ("since *Garmon* . . . we have also reaffirmed . . . a determination that in enacting the NLRA, Congress intended for the Board generally to exercise exclusive jurisdiction in this area").

Professor Kenneth Culp Davis in *Administrative Law Treaties*, Ch.22 (4th Ed. 1983), summarizes primary jurisdiction from the voluminous adjudicated cases, that agencies have exclusive primary jurisdiction to resolve "issues of fact, subject to a limited review" and the normal power of the courts is "suspended" or "preempted" pending the agency action, which "transfers" the "power to determine" from court to agency, citing *United States v. W. Pac. Ry. Co.*, 352 U.S. 59, 63-64 (1956), at p. 83. Professor Davis summarized the use of the doctrine:

> The primary jurisdiction principle applies to all kinds of administrative action and does not notably differ for regulated industries (such as transportation, broadcasting, public utilities) and for programs that cut across industries (such as labor relations, anti-trust, health and safety, environment).

Section 22:4, p. 89.

§ 1392(a)(2), in both delinquent contribution and withdrawal contexts. In any case involving previously filed unfair labor practice charges constituting such basis for withdrawal liability, the Supreme Court noted MPPAA procedures will normally defer to the primary jurisdiction of the NLRB under the federal labor policy:

> [W]hether an employer's unilateral decision to discontinue contributions to a pension plan [permanent withdrawal] constitutes a violation of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law. There are situations in which district judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. **In cases like this,** [post-contract expiration, labor law cases] which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB. *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959).[19]

The Court continued with its footnote 19:

> It is true, as petitioners point out, that district courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal. In such a proceeding, however, **there would not normally be any claim that the employer was guilty of an unfair labor practice** or that liquidated damages were mandated because the employer misjudged the impasse date. (Emphasis added)

There can be no doubt that the Supreme Court fully understood that withdrawal liability involving contested unfair labor practices charges was not something for MPPAA determination, but was subject to the exclusive

primary jurisdiction of the NLRB to which deferral will be given. Here, the labor law issue was not "collateral" to MPPAA. It was central and dispositive of the subsequent MPPAA claim which simply reasserted the identical issue. Under these circumstances, MPPAA arbitration is not required. The Court must adopt the NLRB determined facts and dismiss the withdrawal claim. *Cuyamaca Meats v. San Diego & Imperial Counties Butchers' & Food Employer's Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987).

The Panel opinion thus clearly involves important issues relating to national labor policy and is at odds with long-established principles of primary jurisdiction. Rather than seeking accommodation between two federal statutes, the Panel has obliterated, in this Circuit, the role of the National Labor Relations Board in many bargaining disputes and has drastically modified, without comment, the national labor policy requiring deference to NLRB primary jurisdiction. This Court, *in banc*, should grant rehearing of this important issue of national labor policy in this case.

Respectfully submitted this 15th day of June 1990.

BRADLEY, CAMPBELL, CARNEY
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 1990, I have placed a true and correct copy of the foregoing **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*** in the United States mail, first-class postage prepaid, properly addressed as follows:

James C. Fattor, Esq.
1600 Broadway, Suite 1900
Denver, Colorado 80202-0419
Attorney for Plaintiff-Appellant

/s/ Connie L. Doehring

§ 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer –

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

* * *

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§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part [29 USCS §§ 1381 et seq.] to be the withdrawal liability.

(b) For purposes of subsection (a) –

> (1) The withdrawal liability of an employer to a plan is the amount determined under section 4211 [29 USCS § 1391] to be the allocable amount of unfunded vested benefits, adjusted –
>
> > (A) first, by any de minimis reduction applicable under section 4209 [29 USCS § 1389],

(B) next, in the case of a partial withdrawal, in accordance with section 4206 [29 USCS § 1386],

(C) then, to the extent necessary to reflect the limitation on annual payments under section 4219(c)(1)(B) [29 USCS § 1399(c)(1)(B)], and

(D) finally, in accordance with section 4225 [29 USCS § 1405].

(2) The term "complete withdrawal" means a complete withdrawal described in section 4203 [29 USCS § 1383].

(3) The term "partial withdrawal" means a partial withdrawal described in section 4205 [29 USCS § 1385].

(Sept. 2, 1974, P. L. 93-406, Title IV, Subtitle E, Part 1, § 4201, as added Sept. 26, 1980, P. L. 96-364, Title I, § 104(2), 94 Stat. 1217.)

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§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part [29 USCS §§ 1381 et seq.], shall –

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

§ 1383. Complete withdrawal

(a) Determinative factors. For purposes of this part [29 USCS §§ 1381 et seq.], a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building an construction industry. (1) Notwithstanding subsection (a), in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer –

(i) continues to perform work in the jurisdiction of the collective bargaining

agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 4041A(a)(2) [29 USCS § 1341a(a)(2)]), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

* * *

(d) Other determinative factors. (1) Notwithstanding subsection (a), in the case of an employer who –

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if –

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either –

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 [29 USCS § 1112], or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph 3(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determined that the employer has no further liability under the plan either –

(A) because it determines that the contribution base of the plan has not suffered

substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal. For purposes of this part [29 USCS §§ 1381 et seq.], the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

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§ 1392. Obligation to contribute

(a) Definition. For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising –

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions. Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability. If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

§ 1398. Withdrawal not to occur merely because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because –

(1) an employer ceases to exist by reason of –

(A) a change in corporate structure described in section 4069(b) [29 USCS § 1369(b)], or

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions or obligations to contribute under the plan, or

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this, a successor or parent corporation or other entity resulting from any such change shall be considered the orginal employer.

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor. An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer. (1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall –

(A) notify the employer of –

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer –

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of –

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc. (1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 4211 [29 USCS § 1391], adjusted if appropriate first under section 4209 [29 USCS § 1389] and then under section 4206 [29 USCS § 1386] over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation of the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of –

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 4205(a)(1) [29 USCS § 1385(a)(1) shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 4205(b)(1)(B)(i) [29 USCS § 1385(b)(1)(B)(i)].

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.